# **SAMPLE - SUBJECT TO CHANGE**

**DESIGN BUILD CONTRACT** 

**BETWEEN** 

THE CITY OF HOUSTON

AND

[NAME OF CONTRACTOR]

**FOR** 

ITRP ENABLING UTILITIES - LANDSIDE

**PROJECT No. 822** 

CIP No. A-0800

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# City of Houston – Houston Airport System ITRP ENABLING UTILITIES – LANDSIDE DESIGN BUILD AGREEMENT

\_\_\_\_\_

**IN WITNESS WHEREOF**, intending to be bound, the Parties have entered into this Contract as of the Effective Date.

DESIGN-BUILD CONTRACTOR:	CITY:		
[NAME OF CONTRACTOR]	THE CITY OF HOUSTON, TEXAS		
By Name: Title: Tax ID NO	By Mayor		
ATTEST:	ATTEST:		
By Corporate Secretary	ByCity Secretary  APPROVED:		
	Mario C. Diaz Director, Houston Airport System  APPROVED AS TO FORM:		
	Assistant City Attorney L.D. File No. []  COUNTERSIGNED:		
	City Controller  DATE COUNTERSIGNED:		
	("Effective Date")		

DESIGN BUILD CONTRACT
FOR ITRP ENABLING UTILITIES – LANDSIDE

This <b>DESIGN BUILD CONTRACT</b> ("Contract") is entered into and effective as of the Effective Date, by and between the <b>CITY OF HOUSTON</b> , <b>TEXAS</b> , a home-rule city (the "City") and [
The City is: The City of Houston, Texas
Address for Written Notice: P.O. Box 60106, Houston TX 77205-0106
DESIGN-BUILD CONTRACTOR is: []
Address for Written Notice: []
E-mail address: []
The Project is: []
Project Location: George Bush Intercontinental Airport
Project No: []
DESIGN-BUILD CONTRACTOR's Lead Design Firm is: []
RECITALS
<b>WHEREAS</b> , the City has determined to expand the Mickey Leland International Terminal as part of the ITRP;
<b>WHEREAS</b> , the City has determined that the best method for accomplishing the overall expansion is to split the ITRP into several smaller projects to be procured separately;
<b>WHEREAS</b> , this Contract constitutes the procurement for one of the projects that will form part of the whole ITRP;
<b>WHEREAS</b> , the City has determined to implement the Project using the Design Build project delivery method in accordance with Chapter 2269 of the Texas Government Code (the "Enabling Law"), which determination was made in accordance with the Enabling Law;
<b>WHEREAS</b> , pursuant to the Enabling Law, the City issued a Request for Qualifications ("RFQ") on, in order to obtain Statements of Qualifications from design-build firms interested in being included on a shortlist of qualified design-build firms who would be invited to submit proposals for the performance of the design-build work necessary for the Project;
WHEREAS, in accordance with the requirements and criteria for selection set forth in the RFQ, the City on, 2017, selected design-build firms (including the DESIGN-BUILD CONTRACTOR) for inclusion on its shortlist of qualified design-build firms;

WHEREAS, pursuant to the Enabling Law, the City issued a Notification to Short-listed Proponents on \_\_\_\_\_\_, 2017, requesting each design build firms to submit Technical and Price Proposals;

WHEREAS, each of the qualified design build firms, including the DESIGN-BUILD CONTRACTOR, submitted a proposal (comprising a sealed technical proposal and a separate sealed cost proposal) on \_\_\_\_\_\_, 2017;

WHEREAS, following the review and selection process established in the RFP and based and the proposal and a series formula set forth in the RFP, the City calested the RFP and based and the proposal and a series formula set forth in the RFP.

whereas, following the review and selection process established in the RFP and based on the evaluation criteria and scoring formula set forth in the RFP, the City selected the DESIGN BUILD CONTRACTOR as the highest ranked design build firm among the qualified design build firms that submitted proposals in response to the RFP;

**WHEREAS**, on [\_\_\_\_\_], 2017, the City initiated negotiations with the DESIGN-BUILD CONTRACTOR, which negotiations have concluded with this Contract;

**WHEREAS**, the City desires to receive, and the DESIGN-BUILD CONTRACTOR desires to provide, design-build services for the Project in accordance with the terms and conditions of this Contract;

**NOW THEREFORE**, for and in consideration of the mutual covenants, agreements, and benefits to the Parties herein named, it is agreed as follows:

#### ARTICLE 1. THE PROJECT

1.1 **Project Description**. As of the Effective Date, City intends to construct the Project, a portion of the entire ITRP at IAH, as set forth in **Exhibit "B"**. The date of Substantial Completion for the Construction Phase will be established when and if the Director accepts DESIGN-BUILD CONTRACTOR's Guaranteed Maximum Price proposal.

## ARTICLE 2. CONTRACT DOCUMENTS AND INTERPRETATION

- 2.1 **Contract Documents**. The "**Contract Documents**" comprise:
  - 2.1.1 this Contract and all Exhibits:
  - 2.1.2 any GMP Amendment;
  - 2.1.3 any Change Order or other Modification or Amendment;
  - 2.1.4 any Notice to Proceed; and
  - 2.1.5 any Construction Drawings and Specifications.
- 2.2 **Interpretation**. The Contract Documents are intended to be complimentary, and what is set forth in any one document is as binding as if set forth in each document. The Parties recognize that Amendments and Modifications may provide for specific modification to the terms and conditions of other Contract Documents, in which case, the modified terms and conditions shall govern, as expressly set forth in the Amendment or Modification. However, all terms and conditions of such other Contract Documents that are not expressly modified or deleted by an Amendment or Modification shall remain in effect. **Section 2.3** shall govern matters of interpretation related to the applicability, stringency, and consistency of the Contract Documents, which are included among the

Page 5 – Exhibit A

Contract Standards. Unless stated otherwise in this Contract, if a conflict between the sections of this Contract and the exhibits arises, the sections control over the exhibits.

- 2.3 **Applicability of Contract Standards**. The DESIGN-BUILD CONTRACTOR shall be obligated to comply only with those Contract Standards which are applicable in any particular case. Where more than one Contract Standard applies to any particular performance obligation of the DESIGN-BUILD CONTRACTOR hereunder, each such applicable Contract Standard shall be complied with. In the event there are different levels of stringency among such applicable Contract Standards, the most stringent of the applicable Contract Standards shall govern. In the event of any inconsistency among the Contract Standards, the DESIGN-BUILD CONTRACTOR shall notify the Director. The Director's determination as to the applicable standard shall be binding.
- 2.4 **Defined Terms**. Capitalized terms used in the Contract Documents have the meanings set forth in **Exhibit "A"**. Further interpretation provisions are set forth in **Exhibit "A"**.

## **ARTICLE 3. GENERAL PERFORMANCE REQUIREMENTS**

- 3.1 **Reliance**. The DESIGN-BUILD CONTRACTOR acknowledges and agrees that the City is entering into this Contract in reliance on the DESIGN-BUILD CONTRACTOR's expertise with respect to the performance of the Work. The Project will serve an essential public service and will be critically important to enable the City to continue to meet its needs and obligations. The DESIGN-BUILD CONTRACTOR shall perform the Work in accordance with the Contract Standards to further the interests of the City and the Project.
- 3.2 **Scope of the Work**. The scope of the Work is divided into Preconstruction and Construction Phase Services as more thoroughly described in **Exhibit "B"**. The DESIGN-BUILD CONTRACTOR recognizes that, notwithstanding this division, the components of the Work may overlap and agrees to perform all Work in accordance with the applicable Contract Standards. Except as authorized under a CGMP Amendment, in no event will the DESIGN-BUILD CONTRACTOR commence performance of any construction prior to the issuance of a Notice to Proceed following the GMP Amendment Date.
- 3.3 Information Provided by or on Behalf of the City. The City makes no representation or warranty with respect to any information provided to the DESIGN-BUILD CONTRACTOR by or on behalf of the City in connection with this Contract. The DESIGN-BUILD CONTRACTOR shall assess all risks related to the Project and independently verify and confirm all information supplied to it by or on behalf of the City and upon which the DESIGN-BUILD CONTRACTOR elects to rely in connection herewith. Except as may reasonably be requested by the DESIGN BUILD-CONTRACTOR, expressly permitted by this Contract and General Conditions, and provided there is no resulting increase to the GMP or the Contract Time (unless otherwise agreed by the Director in its sole discretion), DESIGN-BUILD CONTRACTOR shall have no right to relief hereunder, or to make any claim against the City, or to seek any adjustment to compensation or the Contract Times as the result of any error, omission, or insufficiency relating to any information provided to the DESIGN-BUILD CONTRACTOR by or on behalf of the City in connection with this Contract.
- 3.4 **Related Projects**. The DESIGN-BUILD CONTRACTOR acknowledges that the City may undertake other capital projects at or near the Project ("Related Projects") and agrees to accept the obligations of the DESIGN-BUILD CONTRACTOR concerning the Related Projects, as set forth in the General Conditions. Nothing in the Contract Documents shall be interpreted as granting the DESIGN-BUILD CONTRACTOR exclusive occupancy of the Project Site. The DESIGN-BUILD

CONTRACTOR must ascertain to its own satisfaction the scope of the Project and the nature of any other contracts that have been or may be awarded for any Related Project(s).

- 3.5 Responsibility for Personnel and DESIGN-BUILD CONTRACTOR-Related Entities. All obligations of the DESIGN-BUILD CONTRACTOR hereunder shall be performed by DESIGN-BUILD CONTRACTOR-Related Entities (subject to the limitations established herein) who are qualified to perform the specific services and meet all licensing and certification requirements of Applicable Law. The DESIGN-BUILD CONTRACTOR shall be fully responsible, in accordance with the terms and conditions of the Contract Documents, for all Work performed by all DESIGN-BUILD CONTRACTOR-Related Entities. The DESIGN-BUILD CONTRACTOR shall, as between itself and the City, be responsible and liable to the City for, and not relieved of, its obligations under the Contract Documents by, the acts, omissions, breaches, defaults, non-compliance, negligence, wilful misconduct, or other legal fault of each DESIGN-BUILD CONTRACTOR-Related Entity and all references in this Contract to any act, omission, breach, default, non-compliance, negligence, wilful misconduct, or other legal fault of the DESIGN-BUILD CONTRACTOR will be construed accordingly to include any such act, omission, breach, default, non-compliance, negligence, wilful misconduct or other legal fault committed by any other DESIGN-BUILD CONTRACTOR-Related Entity.
- Key Personnel. The DESIGN-BUILD CONTRACTOR acknowledges that the identity and 3.6 commitment of certain key management and supervisory personnel proposed by the DESIGN-BUILD CONTRACTOR in its Proposal were material factors in the selection of the DESIGN-BUILD CONTRACTOR to perform this Contract. Such personnel, their affiliations, and their anticipated roles in the performance of the Work are set forth in Exhibit "D". The DESIGN-BUILD CONTRACTOR shall utilize such personnel to perform such services unless such personnel are unavailable for good cause shown. "Good cause shown" shall not include performing services on other projects for the DESIGN-BUILD CONTRACTOR or any of its Affiliates, but shall include termination for cause, employee death, disability, retirement, or resignation. In the event of any such permissible unavailability, the DESIGN-BUILD CONTRACTOR shall utilize replacement key management and supervisory personnel of equivalent skill, experience, and reputation. Any on-site personnel change shall be proposed to the Director with reasonable advance notice (no less than 30 days) for the Director's review and approval, which shall not be unreasonably withheld or delayed. The Director may exclude from the Project any personnel performing Work if the Director. acting reasonably, determines that an unworkable relationship has developed between the City and the individual.
- 3.7 Designated Representative. The individual identified in Exhibit "D" as the "Designated Representative" shall, until further designation under this Section, act as the designated representative of the DESIGN-BUILD CONTRACTOR with respect to this Contract and shall coordinate with the Director as to administrative matters under this Contract. The DESIGN-BUILD CONTRACTOR may replace the individual designated as its representative under this Contract from time to time by written notice to the Director, subject to the reasonable approval of the Director. The DESIGN-BUILD CONTRACTOR shall replace the individual designated as its representative under this Contract at any time upon written notice by the Director in the Director's reasonable discretion. Any individual designated as the representative of the DESIGN-BUILD CONTRACTOR under this Contract shall have sufficient qualifications and experience to serve as the DESIGN-BUILD CONTRACTOR's representative hereunder and shall be vested with the authority to act on behalf of the DESIGN-BUILD CONTRACTOR, to receive notices on behalf of the DESIGN-BUILD CONTRACTOR, to make binding decisions with respect to the performance of the Work, and to bind the DESIGN-BUILD CONTRACTOR with respect to any certification to be made by the DESIGN-BUILD CONTRACTOR hereunder. The designated representative shall be the Director's

primary contact for the performance of the Work and shall be available, as required, for the benefit of the City and the Project.

## **ARTICLE 4. PRECONSTRUCTION SERVICES**

- 4.1 **Generally**. The DESIGN-BUILD CONTRACTOR shall render and perform the Preconstruction Services for the City in accordance with **Exhibit "B"** and all other applicable Contract Standards. The DESIGN-BUILD CONTRACTOR's responsibility for the Preconstruction Services includes the responsibility to employ or subcontract with (subject to the limitations established herein) all necessary professionals (including architects, if applicable), technicians and engineers, properly qualified, licensed and skilled in the various aspects of the Preconstruction Services, and to perform all services reasonably inferable from the description of the Preconstruction Services.
- 4.2 **Notices to Proceed**. The DESIGN-BUILD CONTRACTOR shall commence performing Preconstruction Services upon the date specified in a Notice to Proceed with Preconstruction Services issued by the Director. The DESIGN-BUILD CONTRACTOR is not entitled to reimbursement for any costs for performance of Preconstruction Phase Services incurred prior to the issuance of a Notice to Proceed. The DESIGN-BUILD CONTRACTOR acknowledges that the Preconstruction Services are segregated into discrete tasks associated with the advancement of the Preconstruction Services, as identified in **Exhibit "B"**, and that a Notice to Proceed with Preconstruction Services may be limited to certain specifically identified tasks. The City will therefore have the right to issue multiple Notices to Proceed with respect to Preconstruction Services, identifying the Preconstruction Services tasks to be performed by the DESIGN-BUILD CONTRACTOR.

#### 4.3 Ownership and Use of Work Products.

- 4.3.1 DESIGN-BUILD CONTRACTOR conveys and assigns to the City its entire interest and full ownership worldwide in and to any work, invention, notes, plans, computations, data bases, tabulations, exhibits, reports, underlying data, photographs and other work products, and any modifications or improvements to them (collectively "Documents"), and the copyrights, patents, trademarks, trade secrets, and any other proprietary rights therein (collectively "Proprietary Rights") that DESIGN-BUILD CONTRACTOR, its agents, employees, contractors, and Subconsultants (collectively "Authors") develop, write, or produce under this Contract (collectively "Works").
- 4.3.2 The Authors shall not claim or exercise any Proprietary Rights related to the Works. If requested by the Director, DESIGN-BUILD CONTRACTOR shall place a conspicuous notation on any Works which indicates that the City owns the Proprietary Rights.
- 4.3.3 DESIGN-BUILD CONTRACTOR shall execute all documents required by the Director to further evidence this assignment and ownership. DESIGN-BUILD CONTRACTOR shall cooperate with the City in registering, creating, and enforcing Proprietary Rights arising under this Contract. If DESIGN-BUILD CONTRACTOR's assistance is requested and rendered under this Section, the City shall reimburse DESIGN-BUILD CONTRACTOR for all out-of-pocket expenses it incurs in rendering assistance, subject to the availability of funds. On termination of this Contract, or if requested by the Director, DESIGN-BUILD CONTRACTOR shall deliver all Works to

- the City. DESIGN-BUILD CONTRACTOR shall obtain written agreements from the Authors which bind them to the terms in this Section.
- 4.3.4 All Works developed, written, or produced under this Contract for use as a contribution to a collective work; a part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; or an atlas, are "works made for hire."
- 4.3.5 DESIGN-BUILD CONTRACTOR may retain copies of the Documents for its archives. DESIGN-BUILD CONTRACTOR shall not otherwise use, sell, license, or market the Documents.
- 4.4 **CGMP.** The Parties anticipate that there may be some phases of Construction that are ready for commencement before the GMP Amendment Date. In addition to the Advanced Packages set forth in **Exhibit "B"**, the DESIGN-BUILD CONTRACTOR may recommend such phases or elements of the Construction ("Advanced Packages") to the Director, as appropriate, during performance of the Preconstruction Phase Services. The Director shall have the sole discretion to authorize an Advanced Package pursuant to this Section and **Exhibit "B"** but has no obligation to enter into any CGMP Amendment. Prior to any such authorization, the DESIGN-BUILD CONTRACTOR shall provide the Director with a CGMP Submittal in accordance with Section 4.4 and **Exhibit "F"**.
- 4.5 **CGMP Submittal**. The DESIGN-BUILD CONTRACTOR shall prepare and submit the CGMP Submittal in accordance with **Exhibit** "**F**" and all other applicable Contract Standards. In the event the Director believes the CGMP Submittal does not comply with the requirements of the Contract and **Exhibit** "**F**", the Director shall provide written notice to the DESIGN-BUILD CONTRACTOR of any additions, corrections, or revisions required to achieve such compliance. The DESIGN-BUILD CONTRACTOR, without any increase in the Preconstruction Phase Services Fee, shall promptly take all necessary rectification action, making multiple re-submittals, if required.
- 4.6 **CGMP Negotiation and Execution.** If the Director agrees to authorize the commencement of a portion of Construction under a CGMP Submittal, the DESIGN-BUILD CONTRACTOR and Director shall negotiate and enter into a CGMP Amendment. A CGMP Amendment at a minimum shall incorporate and definitively address all of the items identified in **Exhibit "F"**, and shall contain any other commercial terms and conditions specific to the Advanced Package (but shall not alter the terms and conditions of this Contract). Advanced Packages may be structured in a manner that provides for the commencement of the related Construction at any time determined by the Parties.
- 4.7 **CGMP Amendment**. If the Director determines to accept the CGMP Submittal, following negotiations at the election of the Director in his sole discretion and subject to approval by the Director, the Parties will enter into the CGMP Amendment and the CGMP Amendment Date will be established hereunder. Subject to the appropriation of funds, the Director has the authority to enter into a CGMP Amendment. Upon the Director's approval of a CGMP Amendment, the CGMP Amendment shall become a part of this Contract for all purposes.
- 4.8 **Complete Pricing**. It is the intention of the Parties that each CGMP Submittal, and any associated CGMP Amendment, includes complete pricing for the Work to be performed thereunder. Accordingly, all such amounts in CGMP Amendments shall be excluded in determining the Cost of the Work for the GMP Amendment. The Construction Phase Fee, however, is intended to and shall be applicable to all construction whether performed as part of the CGMP Amendment or otherwise with the Construction Phase. The Parties acknowledge and agree that the Preconstruction Phase

Services Fee and the Construction Phase Fee were negotiated by the Parties prior to the Effective Date and included in the Contract as executed on the Effective Date, and shall not be the subject of the CGMP and/or GMP Submittal or the CGMP and/or GMP Amendment.

- 4.9 **CGMP Compensation.** The City shall pay the CGMP for the Advanced Package Work to the DESIGN-BUILD CONTRACTOR for Work properly performed and completed pursuant to the terms of the CGMP Amendment in accordance with, and subject to the limitations contained in this Contract, notwithstanding the fact that no GMP Amendment will be in effect at the time the Parties execute a CGMP Amendment.
- 4.10 **GMP Submittal**. The DESIGN-BUILD CONTRACTOR shall prepare and submit the GMP Submittal in accordance with **Exhibit** "**F**" and all other applicable Contract Standards. In the event the Director believes the GMP Submittal does not comply with the requirements of the Contract including **Exhibit** "**F**", the Director shall provide written notice to the DESIGN-BUILD CONTRACTOR of any additions, corrections, or revisions required to achieve such compliance. The DESIGN-BUILD CONTRACTOR, without any increase in the Preconstruction Phase Services Fee, shall promptly take all necessary rectification action, making multiple re-submittals, if required.
- 4.11 **GMP Amendment**. If the Director determines to accept the GMP Submittal, following negotiations at the election of the Director in his sole discretion and subject to approval by the City Council, the Parties will enter into the GMP Amendment and the GMP Amendment Date will be established hereunder and thereupon the Construction Phase shall commence. Upon countersignature by the City Controller, the GMP Amendment shall become a part of this Contract for all purposes.
- 4.12 Failure to Reach a GMP. In the event the City rejects the GMP Amendment, the City, in its sole discretion, may direct the DESIGN-BUILD CONTRACTOR at no additional cost to the City, to adjust the design and/or scope to attempt to bring the Guaranteed Maximum Price to an amount acceptable to the City or the City may elect to end its attempt to reach an agreement with the DESIGN-BUILD CONTRACTOR. In the event DESIGN-BUILD CONTRACTOR's scope of work is reduced by the Director, then the Director and DESIGN-BUILD CONTRACTOR shall attempt to negotiate a new GMP. In the event the City elects to end its attempts to reach an agreement with the DESIGN-BUILD CONTRACTOR, the DESIGN-BUILD CONTRACTOR does hereby assign all rights to any agreement with Designer to the City effective upon written notice of acceptance by the City to the DESIGN-BUILD CONTRACTOR and Designer. The City shall not be responsible for any past due amounts that the DESIGN-BUILD CONTRACTOR owes to the Designer, provided that the City has paid DESIGN-BUILD CONTRACTOR such amounts. The City shall be entitled to use any intellectual property developed by or on behalf of DESIGN-BUILD CONTRACTOR for this Project for the completion, maintenance, and further development of the ITRP, or for any other purpose, without additional compensation to DESIGN-BUILD CONTRACTOR.

#### ARTICLE 5. CONSTRUCTION SERVICES

5.1 **Generally**. The DESIGN-BUILD CONTRACTOR shall render and perform Construction Phase Services for the City in accordance with **Exhibit "B"**, **Exhibit "C"**, and all other applicable Contract Standards. The DESIGN-BUILD CONTRACTOR's responsibility for the Construction Phase Services includes the responsibility to employ or subcontract with (subject to the limitations established herein) all necessary professionals (including architects, if applicable) technicians and engineers, properly qualified, licensed and skilled in the various aspects of the Construction Phase Services, and to perform all services reasonably inferable from the description of the Construction Phase Services.

- 5.2 **Notices to Proceed**. The DESIGN-BUILD CONTRACTOR shall commence performing Construction Phase Services upon the date specified in a Notice to Proceed with Construction Phase Services issued by the Director. The DESIGN-BUILD CONTRACTOR acknowledges that the Construction Phase Services are segregated into discrete tasks associated with the advancement of the Preconstruction Services, as identified in **Exhibit "B"**, and that a Notice to Proceed with Construction Phase Services may be limited to certain specifically identified tasks. The City will therefore have the right to issue multiple Notices to Proceed with Construction Phase Services, identifying the Construction Phase Services tasks to be performed by the DESIGN-BUILD CONTRACTOR.
- 5.3 The DESIGN-BUILD CONTRACTOR warrants, represents, covenants, and agrees that all of the services to be performed by it under or pursuant to this Contract shall be of at least the standard and quality which prevail among similar businesses and organizations with knowledge and skill engaged in providing similar services in major United States urban areas under the same or similar circumstances and involving a project such as the Project, including the performance of work in a high volume and international airport with ongoing operations.
- 5.4 The DESIGN-BUILD CONTRACTOR's duties as set forth herein shall at no time be in any way diminished by reason of any approval by the City or the Director nor shall the DESIGN-BUILD CONTRACTOR be released from any liability by reason of such approval by the Director, it being understood that the City at all times is ultimately relying upon the DESIGN-BUILD CONTRACTOR's skill and knowledge in performing the services required hereunder.
- 5.5 The DESIGN-BUILD CONTRACTOR warrants, represents, covenants, and agrees that the DESIGN-BUILD CONTRACTOR and all persons connected with the DESIGN-BUILD CONTRACTOR directly in charge of its services are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction, if so required by such laws, rules and regulations.
- 5.6 The DESIGN-BUILD CONTRACTOR warrants, represents, covenants, and agrees to notify Director in writing within five days of anything within its knowledge which it discovers of any nature in any drawings, specifications, plans, sketches, instructions, information, requirements, procedures, and other data supplied to the DESIGN-BUILD CONTRACTOR (by the City or any other party) which the DESIGN-BUILD CONTRACTOR considers in its opinion to be unsuitable, improper, inaccurate, or defective in any way in connection with the purposes for which such document or data is furnished. Nothing shall excuse or detract from the DESIGN-BUILD CONTRACTOR's responsibilities or obligations hereunder in any case where such document or data is furnished unless the DESIGN-BUILD CONTRACTOR advises City in writing that in DESIGN-BUILD CONTRACTOR's opinion such document or data and any requests made therein for action are unsuitable, improper, inaccurate or defective, and City confirms in writing that it wishes the DESIGN-BUILD CONTRACTOR to proceed in accordance with the documents or data as originally given. DESIGN-BUILD CONTRACTOR shall suspend that portion of the Work affected by the reported discrepancy until clarification is received. If DESIGN-BUILD CONTRACTOR does not suspend work, any increase in cost as a result, including the necessity to perform any re-work, shall be borne by DESIGN-BUILD CONTRACTOR and not be reimbursable under this Contract. Notwithstanding the foregoing DESIGN-BUILD CONTRACTOR shall be responsible for all errors and omissions and lack of coordination in its own documents and the documents created by those working for DESIGN-BUILD CONTRACTOR.
- 5.7 The DESIGN-BUILD CONTRACTOR warrants, represents, covenants, and agrees to furnish efficient business administration and superintendence and perform its services hereunder in the best way and in the most expeditious and economical manner consistent with the requirements of the Contract Documents.

- In accordance with and not as an expansion of the time limitations set forth in the General Conditions, the DESIGN-BUILD CONTRACTOR warrants, represents, covenants, and agrees that it shall, at its own cost, make good any errors or omissions in the Preconstruction Services and Construction Phases it performs as soon as the DESIGN-BUILD CONTRACTOR becomes aware of such errors or omissions or is notified of such errors or omissions. Should the DESIGN-BUILD CONTRACTOR refuse or neglect to make good such errors or omissions within a reasonable time after receiving written notice requesting such remedial work, then the City shall be entitled to make good such errors or omissions at the expense of the DESIGN-BUILD CONTRACTOR. This commitment by DESIGN-BUILD CONTRACTOR is in addition to, and not in substitution for, any other remedy for errors or omissions in the Preconstruction Phase Services and Construction Phase which the City may have at law or in equity.
- 5.9 DESIGN-BUILD CONTRACTOR shall attend training on the HAS Project Management System and utilize that system for the numbering and tracking for all Work records, including, Modifications, requests for information, submittals and supplementary instructions, and shall provide updated records, including meeting minutes, at each meeting with City as requested. The numbering system shall be consistent with the HAS Project Controls System.
- 5.10 Subcontracts or other agreements shall conform to the applicable payment provisions of the Contract Documents, and shall not be awarded on the basis of cost plus a fee without the prior written consent of Director.
- 5.11 DESIGN-BUILD CONTRACTOR shall require its Subcontractors who have not competitively bid to disclose to Director their markups (both overhead and profit), estimates, and costs calculated in their bids or incurred or expected in sub-subcontracts and the Work performed, including any Change Order Work, for the assessment of reasonableness by the Director.
- DESIGN-BUILD CONTRACTOR shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to DESIGN-BUILD CONTRACTOR by the terms of the Contract Documents, and to assume toward DESIGN-BUILD CONTRACTOR all the obligations and responsibilities that DESIGN-BUILD CONTRACTOR, by these Documents, assumes toward City. Each subcontract agreement shall preserve and protect the rights of City under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights. Where appropriate, DESIGN-BUILD CONTRACTOR shall require each Subcontractor to enter into similar agreements with subsubcontractors. DESIGN-BUILD CONTRACTOR shall make available to the Director and to each proposed subcontractor prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with the Contract Documents. Subcontractors shall similarly make copies of applicable portions of such documents available to their respective proposed subsubcontractors. DESIGN-BUILD CONTRACTOR shall provide City with a copy of each subcontract agreement upon request.
- 5.13 Each subcontract agreement is assignable by DESIGN-BUILD CONTRACTOR to City on acceptance by the Director of the assignment. DESIGN-BUILD CONTRACTOR agrees to execute such additional documents as City may request to confirm such assignments. DESIGN-BUILD CONTRACTOR shall include a provision in each subcontract agreement recognizing the rights of City pursuant to the foregoing contingent assignment. Despite such acceptance by City of any such assignment, City shall not be liable for anything under such subcontract prior to the acceptance by City of the assignment or for any liability of DESIGN-BUILD CONTRACTOR to the Subcontractor.

Acceptance of any such assignment shall not relieve DESIGN-BUILD CONTRACTOR or the Subcontractor of their responsibilities and liabilities for any Work performed prior to City's acceptance of such assignment.

- 5.14 Nothing contained in the Contract Documents shall create any obligations or liabilities owed by City to any Subcontractor or Supplier. Except as may be required by law, City shall have no liability or responsibility for the performance or misperformance of any Subcontractor, Supplier, or consultant, even if City designated, required, identified or approved such Subcontractor, Supplier, consultant, or sub-consultant of any tier.
- 5.15 DESIGN-BUILD CONTRACTOR is an independent contractor and not an agent of City. DESIGN-BUILD CONTRACTOR shall be liable to City for acts and omissions that result in a breach of the obligations herein of DESIGN-BUILD CONTRACTOR and DESIGN-BUILD CONTRACTOR's Subcontractors and Suppliers of any tier, and their agents, employees and parties in privity of contract with any of them and anyone acting on behalf of any of them, and any other persons performing any of the Work directly or indirectly under contract with DESIGN-BUILD CONTRACTOR, including any design professionals and their consultants and sub-consultants of any tier.
- 5.16 DESIGN-BUILD CONTRACTOR and any of its design professionals, consultants, the Subcontractors and Suppliers and their agents and employees warrant that the information provided to City about the qualifications, including financial information and past performance, is accurate, has not materially changed, and does not omit information that would materially affect those qualifications and that DESIGN-BUILD CONTRACTOR is financially sound, fully solvent, and experienced in and fully qualified to perform the type of Work to be performed under this Contract.
- 5.17 DESIGN-BUILD CONTRACTOR represents that it has: (a) visited the Project site, (b) taken such other steps as may be necessary to ascertain the nature and location of the Work and the general and local conditions that affect the Work or the cost thereof, and (c) investigated the labor situation, including the availability of all necessary labor and material.
- 5.18 DESIGN-BUILD CONTRACTOR shall coordinate with other Contractors and projects on or around the Project site, as well as the Project Team or other HAS staff, and to minimize disruptions to normal airport operations.
- 5.19 Without diminishing the other obligations of DESIGN-BUILD CONTRACTOR, DESIGN-BUILD CONTRACTOR represents and agrees that it will perform its services under no circumstances with less than the usual and customary standards of DESIGN-BUILD CONTRACTOR's profession or business and in compliance with all Applicable Laws and in strict accordance with the Contract Documents. DESIGN-BUILD CONTRACTOR agrees to correct in a timely manner and as may be directed by the Director and to bear the full cost of correcting DESIGN-BUILD CONTRACTOR's Work and services that are not in strict conformance with the Contract Documents or Applicable Laws or that are otherwise defective or negligently performed, those of its Subcontractors, Suppliers, and consultants, and any related damages or other harm. The term defective work or similar terms when used in the Contract Documents include Work that is not in strict conformance with the Contract Documents. DESIGN-BUILD CONTRACTOR agrees to perform Work required by the Contract Documents in a good and workman-like manner.
- 5.20 DESIGN-BUILD CONTRACTOR represents and agrees to perform its services under the Contract Documents in an expeditious and economical manner consistent with good business practices and the interests of City in accordance with the Project Schedule reflected in **Exhibit "I"**.

- 5.21 DESIGN-BUILD CONTRACTOR represents and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of its obligations under this Contract.
- 5.22 Except for the obligations of City set forth in this Contract, City has no liability to DESIGN-BUILD CONTRACTOR or to anyone claiming through or under DESIGN-BUILD CONTRACTOR by reason of the execution or performance of this Contract.
- 5.23 DESIGN-BUILD CONTRACTOR shall give all required notices and comply with all Applicable Laws. The Work, including documents that are the responsibility of DESIGN-BUILD CONTRACTOR, shall be in accordance with all Applicable Laws. If DESIGN-BUILD CONTRACTOR otherwise performs any Work that is contrary to Applicable Laws, DESIGN-BUILD CONTRACTOR shall correct such Work at its expense and shall be liable for all costs, delays, and damages attributable thereto, including any damage to other Work or other property arising from or relating to the corrective Work.
- 5.24 DESIGN-BUILD CONTRACTOR shall establish, implement, and follow a quality control program for the Work during all Construction Phases. DESIGN-BUILD CONTRACTOR shall provide Director with a copy of the written quality control program.
- 5.25 DESIGN-BUILD CONTRACTOR shall provide Value Engineering suggestions to Director. Whenever the term "Value Engineering" is used in conjunction with this Contract or the Project, it has its commonly accepted meaning within the construction industry and does not imply the practice of professional engineering without a license. If any Value Engineering activities constitute the professional practice of engineering, then such activities shall be performed by an engineer licensed in Texas.
- 5.26 DESIGN-BUILD CONTRACTOR shall give constant attention to the Work to facilitate the progress thereof, and shall cooperate with the Director, inspectors, and with other Contractors in every way possible. The Director may determine the areas in which the DESIGN-BUILD CONTRACTOR and Contractors shall work in the event of a disagreement, and the DESIGN-BUILD CONTRACTOR shall cooperate in such processes and decisions. The DESIGN-BUILD CONTRACTOR shall have a competent Superintendent on the Work at all times who is fully authorized as his/her agent on the Work. The Superintendent shall be capable of reading and fully understanding the plans and specifications and schedules, shall receive and fulfill instructions from the Director, and shall be present at the Work site at all times while Work is in progress.
- 5.27 The City will be performing additional work with other Contractors as well as continuing with its normal airport operations on or near the Work covered by this Contract. When separate contracts are let within the limits of any one project, DESIGN-BUILD CONTRACTOR shall conduct its Work so as not to interfere with or hinder the progress or completion of the work being performed by other Contractors. DESIGN-BUILD CONTRACTOR shall cooperate with other Contractors, City consultants, design professionals, City employees, and others as directed by the Director. In the event an interference cannot be reasonably avoided, DESIGN-BUILD CONTRACTOR shall notify the City before the Work is impacted to resolve the interference.
- 5.28 DESIGN-BUILD CONTRACTOR shall arrange its work and shall place and dispose of the materials being used so as to not interfere with the operations of other Contractors within the limits of the same project. DESIGN-BUILD CONTRACTOR shall join its work with that of the others in an acceptable manner and shall perform it in proper sequence to that of the others.

- 5.29 Subject to the obligations to cooperate with the City and Contractors with respect to contemporaneous operations and proximity at the Project site including, without limitation, relocating work areas, the DESIGN-BUILD CONTRACTOR remains solely responsible for its means, methods, techniques, sequences and procedures and safety programs in connection with its Work.
- 5.30 DESIGN-BUILD CONTRACTOR acknowledges that the Project site is, and at all times during the Work will be, within or around critically important areas of the operational airfield at IAH. DESIGN-BUILD CONTRACTOR agrees that at all times when any forces are mobilized to strictly adhere to rules and instructions regarding permitted activities and physical locations on the airfield given by any authorized HAS personnel. Such instructions will include, without limitation, demobilizing from Work areas on minutes' notice to allow aircraft movement; coordination of phased work areas to keep aircraft paths open and operational; vigilant cleaning and removal of all foreign object debris caused by its Work from any areas on which aircraft may travel. DESIGN-BUILD CONTRACTOR agrees and warrants that all delays and disruptions within the reasonable contemplation of those knowledgeable of airfield operations (including absolute deference to aircraft operations) caused by such adherence to rules and instructions or coordination for activities as specified herein have been taken into account in preparing the Guaranteed Maximum Price and that DESIGN-BUILD CONTRACTOR will not seek any increase in the Guaranteed Maximum Price or the Contract Time on account of such adherence and coordination, with the exception of those airport operation delays which are longer than 48 hours and constitute critical delay to the final completion of the Project (an "Exceptional Delay"), but only to the extent that the aggregate number of days of critical exceed 14 Calendar Days. Compensation for critical Exceptional Delays shall be limited to General Conditions costs for DESIGN-BUILD CONTRACTOR and Subcontractors for the extended period only, without markup for profit and overhead, DESIGN-BUILD CONTRACTOR agrees that the City's needs arising from its ongoing airport operations as described herein has been expressly contemplated by DESIGN-BUILD CONTRACTOR and shall not constitute active interference by the City. City will jointly coordinate the activities of its separate Contractors to minimize any such delay or disruption, as well as the impact of any such delay or disruptions.
- All Subcontracts shall be awarded in accordance with the applicable provisions of Texas Government Code Chapter 2269 through a process overseen by the Project Team. DESIGN-BUILD CONTRACTOR shall notify Director in advance in writing of the identities of all Subcontractors with which it intends to subcontract. DESIGN-BUILD CONTRACTOR shall not subcontract with any Subcontractor to which Director has a reasonable objection in accordance with Texas Government Code Chapter 2269. A notice of intent to employ a particular Subcontractor shall be given by the DESIGN-BUILD CONTRACTOR to the City as to permit Director adequate time for review of the prospective Subcontractor without delay to the Project and to allow time for DESIGN-BUILD CONTRACTOR to make substitute selections, but in no event shall such notice be given less than 10 days before the intended subcontract date. If Director has a reasonable objection to a proposed Subcontractor, DESIGN-BUILD CONTRACTOR shall propose another against whom Director has no reasonable objection. DESIGN-BUILD CONTRACTOR shall not be required to subcontract with any Subcontractor to which it has reasonable objection. When DESIGN-BUILD CONTRACTOR's Subcontractors for constructing the Work have been identified, they shall not be changed without Director's prior written approval, which shall not be unreasonably withheld. DESIGN-BUILD CONTRACTOR shall not incur any Subcontract costs prior to issuance by City of a Notice to Proceed for such Work. If the bidding process does not result in the selection of a subcontractor who is acceptable to the Director, the Director may ask the DESIGN-BUILD CONTRACTOR to submit a proposal for the specific portion of work for approval.
- 5.32 The DESIGN-BUILD CONTRACTOR shall (1) submit pricing for any proposed self-performed Work in the same manner as all other Subcontractors (2) perform self-performed Work in

accordance with the same terms and conditions as its other Subcontractors, and (3) account for self-performed Work in the same manner as if the Work had been performed by other Subcontractors. In order to afford the City with maximum flexibility and the opportunity to achieve the best value, the DESIGN-BUILD CONTRACTOR shall not self-perform any work to which the Director has a reasonable objection.

#### ARTICLE 6. LIQUIDATED DAMAGES

- 6.1 **Liquidated Damages Generally**. Additional liquidated damages provisions are set forth in Article 9 of the General Conditions.
- Failure to Achieve Milestones. DESIGN-BUILD CONTRACTOR and City agree that 6.2 failure to achieve the Project milestones in this Section by the dates set forth in the agreed upon Guaranteed Maximum Price proposal will cause damages to City and that actual damages from such harm are difficult to estimate accurately. Therefore, DESIGN-BUILD CONTRACTOR and City agree that DESIGN-BUILD CONTRACTOR and Surety are liable for and shall pay to City the amounts below per Day, on a cumulative basis, as liquidated damages and not as a penalty, for each and every Day or portion of a Day of delay beyond the milestone dates established in the approved Guaranteed Maximum Price proposal for the Project. DESIGN-BUILD CONTRACTOR and City agree that the amounts of liquidated damages fixed in this Section are reasonable forecasts of just compensation for harm to City resulting from DESIGN-BUILD CONTRACTOR's failure to achieve the milestones set forth herein. These liquidated damages shall be City's sole remedy for damages from delay by DESIGN-BUILD CONTRACTOR except that City shall be entitled to recover all of its actual, direct, and consequential damages in the event liquidated damages are determined to be unenforceable, and City shall also be entitled to City's remedies under Article 14 of the General Conditions. Liquidated damages for each of the Project milestones are as follows:
  - 6.2.1 Completion of Phase 1 Pre-Construction Milestone: \$1,000 per Day. The milestone duration is two hundred nineteen (219) Calendar Days from Notice to Proceed to submission of the GMP.
  - 6.2.2 Substantial Completion of Advanced Package 1 : \$5,000 per Day. The estimated Milestone duration is four hundred twenty-seven (427) Calendar Days from Phase 1 Notice to Proceed.
  - 6.2.3 Substantial Completion of Advanced Package 2: \$1,000 per Day. The estimated Milestone duration is three hundred seventeen (317) Calendar Days from Phase 1 Notice to Proceed.
  - 6.2.4 Substantial Completion of Advanced Package 3: \$1,000 per Day. The estimated Milestone duration is two hundred thirty-five (235) Calendar Days from Phase 1 Notice to Proceed.
  - 6.2.5 Procurement and Delivery of Advanced Package 4: \$1,000 per Day. The estimated Milestone duration is six hundred twenty-three (623) Calendar Days from Phase 1 Notice to Proceed.
  - 6.2.6 Final Completion of Phase 2 Construction Milestone: \$15,000 per Day. The milestone duration is seven hundred sixteen (716) Calendar Days from Phase 2 Construction Notice to Proceed.

- High Sulfur Diesel Fuel Usage. The DESIGN-BUILD CONTRACTOR and City agree that 6.3 incidents of high sulfur diesel fuel usage by DESIGN-BUILD CONTRACTOR will cause damages to City and that actual damages from such harm are difficult to estimate accurately. Therefore, DESIGN-BUILD CONTRACTOR and City agree that DESIGN-BUILD CONTRACTOR and Surety are liable for and shall pay to City the amount stipulated in this Section as liquidated damages. DESIGN-BUILD CONTRACTOR and City agree that DESIGN-BUILD CONTRACTOR and Surety are liable for and shall pay to City, as liquidated damages and not as a penalty, the amount equal to \$1,200.00 per diesel operating vehicle or piece of motorized equipment per incidence of high sulfur diesel fuel usage per Day. DESIGN-BUILD CONTRACTOR and City agree that the amount of liquidated damages fixed in this Section is a reasonable forecast of just compensation for harm to City resulting from an incident of high sulfur diesel fuel usage. An incident of high sulfur diesel fuel usage as used herein means use of fuel in breach of the General Conditions. DESIGN-BUILD CONTRACTOR and City agree that in the event the amount of liquidated damages set forth in this Section are held to be unenforceable for any reason, City shall be entitled to recover its actual direct damages, if any, resulting from incidence of high sulfur diesel fuel usage as may be authorized by the laws of Texas.
- **6.4 Liquidated Damages for CGMPs**. The Director shall issue a separate Notice to Proceed or Change Order for each phase of Construction and each phase of Construction shall have a separate substantial completion date and a separate liquidated damages amount, as appropriate.

## ARTICLE 7. TIME

- 7.1 **Time of the Essence**. Time limits stated in the Contract Documents are of the essence. DESIGN-BUILD CONTRACTOR is responsible for schedule development and updating and reporting throughout the Project, including Preconstruction Services and Construction Services. DESIGN-BUILD CONTRACTOR shall comply in all regards with requirements set forth in the Contract Documents. The anticipated date for submitting a GMP shall be the date specified in the Preconstruction Phase Notice to Proceed.
  - 7.1.1 A phase of Construction shall be deemed to commence on the Date of Commencement of the Work specified in a Notice to Proceed for a phase of Construction after approval of the CGMP or GMP proposal.
  - 7.1.2 DESIGN-BUILD CONTRACTOR shall achieve Final Completion of the Work on or before the date agreed to in the GMP Submittal, subject to time extensions granted by Change Order.
  - 7.1.3 THE TIMES SET FORTH FOR COMPLETION OF THE WORK IN THE NOTICE TO PROCEED WITH CONSTRUCTION AND THE GMP SUBMITTAL ARE AN ESSENTIAL ELEMENT OF THIS CONTRACT.
- 7.2 **Services**. The DESIGN-BUILD CONTRACTOR shall complete all services in accordance with the completion dates set forth in the Preconstruction Services Schedule, as such dates may be adjusted in accordance with the General Conditions. The DESIGN-BUILD CONTRACTOR recognizes that the Preconstruction Services Schedule is of the essence and that the City shall be entitled to the recovery of damages from the DESIGN-BUILD CONTRACTOR as set forth in Article 6.2.1 for the DESIGN-BUILD CONTRACTOR's failure to comply with the Preconstruction Services

Schedule, subject to the terms and conditions of the Contract Documents.

#### ARTICLE 8. CONTRACT COMPENSATION

# 8.1 **General Payment Requirements.**

- 8.1.1 In addition to the payment terms set forth in this Article, the general requirements for payment, including the procedures and timing for the Applications for Payment, for DESIGN-BUILD CONTRACTOR's Services are set forth in Article 9 of the General Conditions.
- 8.1.2 As of the Effective Date, the maximum amount payable to the DESIGN-BUILD CONTRACTOR under this Contract is as follows:

# **Preconstruction Phase and Design Services Price:**

Lump Sum – Preconstruction Services	\$
Lump Sum – Design Services to 60% Design Development (for GMP)	\$
Lump Sum – Design Services from 60% Design Development to	
100% Construction Documents	\$
TOTAL PRECONSTRUCTION PHASE AND DESIGN SERVICES	\$

## **Construction Phase Services**

The DESIGN-BUILD CONTRACTOR's Fee and percentage amount based on the estimated Cost of the Work are as follows:

- 8.1.2.1. The DESIGN-BUILD CONTRACTOR shall plan and design the Project in such a manner that the Agreed Cost of the Work does not exceed the sum of \$\_\_\_\_\_ without the express written approval of the Director. The sum of \$\_\_\_\_ may be increased or decreased by the Director, in his sole discretion.
- 8.1.2.2. The DESIGN-BUILD CONTRACTOR shall continuously monitor and participate in updating the Probable Cost of the Work throughout the design process. If at any time during the course of this Project the Probable Cost of the Work, for all work designed and specified, exceeds or becomes likely to exceed the Agreed Cost of the Work, as updated from time to time, the DESIGN-BUILD CONTRACTOR shall immediately notify the Director. Upon becoming aware that the Probable Cost of the Work will exceed the current Agreed Cost of the Work, the Director, in his sole discretion, may by written notice: (i) increase the Cost of the Work (ii) reduce the scope, or (iii) require a re-design of the Project by DESIGN-BUILD CONTRACTOR.

- 8.1.2.3. There shall be no increase in the DESIGN-BUILD CONTRACTOR's compensation for any such re-design to maintain the Agreed Cost of the Work.
- 8.1.2.4. For purposes of **Section 8.1.2**, inclusive of all sections therein, no person other than the Director may provide written authorization to change the Agreed Cost of the Work specified herein.
- 8.1.3 As of the Effective Date, the maximum amount payable to the DESIGN-BUILD CONTRACTOR under this Contract is \$\_\_\_\_\_\_\_, which is the total amount for compensation for the performance of Preconstruction Services. Without limiting any term or condition hereunder with respect to payments to the DESIGN-BUILD CONTRACTOR, the DESIGN-BUILD CONTRACTOR's entitlement to, and the City's obligation to pay, any additional compensation to the DESIGN-BUILD CONTRACTOR for the performance of the Work will be dependent upon the execution of a CGMP Amendment and/or the GMP Amendment. The DESIGN-BUILD CONTRACTOR recognizes that the City has no obligation hereunder to enter into any such amendment. In the event the Director and DESIGN-BUILD CONTRACTOR agree on a GMP and the Director authorizes DESIGN-BUILD CONTRACTOR to proceed with Construction Phase Services, DESIGN-BUILD CONTRACTOR's compensation shall be calculated under Section 8.3.

# 8.2 Preconstruction Services Price – Phase 1 Only.

- 8.2.1 Subject to the City's limit of appropriation, for properly performed and completed Preconstruction Phase Services, City shall pay DESIGN-BUILD CONTRACTOR a lump sum amount of \$\_\_\_\_\_ and a lump sum amount for Design Services to 60% Design Development (for GMP) of \$\_\_\_\_ and a lump sum amount for Design Services from 60% Design Development to 100% Construction Documents of \$\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_\_ for a Total Preconstruction Phase and Design Services amount of \$\_\_\_\_\_\_ for a Total Preconstruction Phase Phase
- 8.2.2 City will pay DESIGN-BUILD CONTRACTOR on the basis of invoices showing the percentage of services performed and materials purchased during the preceding month for Preconstruction Phase Services based upon the allocation of the Preconstruction Services Price set forth above. The Preconstruction Services Price shall be deemed to be full compensation to DESIGN-BUILD CONTRACTOR for all Preconstruction Phase Services, including all costs, overhead, and profit.
- 8.2.3 All payment requests for Preconstruction Phase Services shall be submitted on an Application for Payment and Schedule of Values approved by Director and includes all required attachments identifying payments to DESIGN-BUILD CONTRACTOR, as well as to all Subcontractors.
- 8.2.4 DESIGN-BUILD CONTRACTOR shall not be entitled to an increase in the Preconstruction Services amount set forth in this Section because of Project Schedule extensions or delays, or changes in the scope of the proposed Project, unless such extensions, delays, or changes are material and significant as determined by the Director in his reasonable, sole discretion.

8.2.5 During the Preconstruction Phase, the Director shall have the right but not the obligation, to negotiate performance incentives, and the City and DESIGN-BUILD CONTRACTOR may amend this Contract to incorporate such incentives, if any, provided that the DESIGN-BUILD CONTRACTOR has then met all its obligations under this Contract as determined by the Director in his sole discretion.

# 8.3 Construction Phase Payments - Phase 2 Only.

- 8.3.1 Pursuant to the terms of this Contract, City shall pay DESIGN -BUILD CONTRACTOR for DESIGN-BUILD CONTRACTOR's proper and complete performance of the Construction Phase Services, the Cost of the Work and the DESIGN-BUILD CONTRACTOR's Fee, up to the limit of the applicable CGMP or the Guaranteed Maximum Price in accordance with the payment provisions of the General Conditions. Payment by City shall be deemed full compensation to DESIGN-BUILD CONTRACTOR for the performance of the Construction Phase. In the General Conditions, references to adjustments in "cost" or "costs" refer to Costs of the Work as defined below, and references to DESIGN-BUILD CONTRACTOR's "home/branch office overhead" and "profit" refer to DESIGN-BUILD CONTRACTOR's Fee.
- 8.3.2 DESIGN-BUILD CONTRACTOR shall not receive any fee for Work deleted by Modifications. The DESIGN-BUILD CONTRACTOR's Fee shall be compensation in full to DESIGN-BUILD CONTRACTOR for all overhead and profit and all costs not otherwise recoverable.
- 8.3.3 The sum of the Cost of the Work and DESIGN-BUILD CONTRACTOR's Fee is guaranteed by DESIGN-BUILD CONTRACTOR not to exceed whatever Guaranteed Maximum Price Director and DESIGN-BUILD CONTRACTOR may agree upon in writing, subject to additions and deductions by Change Order as provided in the Contract Documents. This maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs that would cause the Guaranteed Maximum Price to be exceeded shall be paid by DESIGN-BUILD CONTRACTOR without reimbursement by City. No Change Order shall affect the Guaranteed Maximum Price unless the Change Order specifies the exact total change to the Guaranteed Maximum Price.
- 8.3.4 In the event that the DESIGN-BUILD CONTRACTOR is required to pay or bear the burden of any new federal, state, or local tax, or of any rate increase of an existing tax (except a tax on income) with respect to its forces and/or its performance of the Work as a result of any statute, court decision, written ruling, or regulation taking effect after the Effective Date of this Contract, the Guaranteed Maximum Price shall be increased by the amount of the new tax or tax increase upon proof satisfactory to the Director that such increase has been applied to DESIGN-BUILD CONTRACTOR.
- 8.3.5 If the sum of the Cost of the Work and the DESIGN-BUILD CONTRACTOR's Fee for the Construction Phase is less than the Guaranteed Maximum Price for such Phase, then all such savings shall all be retained by City.
- 8.3.6 Subject to the City's appropriation of funds, in full consideration of DESIGN-BUILD CONTRACTOR's services during Phase 2 Construction the City shall pay the DESIGN-BUILD CONTRACTOR's Fee of % of the Cost of the Work, in addition

to a lump sum price of \$\_\_\_\_\_ for the DESIGN-BUILD CONTRACTOR'S Preconstruction Phase and Design Services. DESIGN-BUILD CONTRACTOR agrees that if the Guaranteed Maximum Price, inclusive of CGMPs, increases or decreases from the amount originally agreed upon, the DESIGN-BUILD CONTRACTOR's Fee will increase or decrease based upon the actual Cost of the Work. Notwithstanding anything in the Contract Documents to the contrary, DESIGN-BUILD CONTRACTOR shall not earn a fee on the lump sum price of the Designer. DESIGN-BUILD CONTRACTOR's Fee is inclusive of **DESIGN-BUILD** CONTRACTOR's profit, general overhead and all expenses in connection with maintaining and operating DESIGN-BUILD CONTRACTOR's main office and any branch office, including:

- 8.3.6.1. Salaries of persons employed in the main or branch offices of the DESIGN-BUILD CONTRACTOR whose time is devoted to the general conduct of the DESIGN-BUILD CONTRACTOR's business for the Project, such as project executives, operations managers, contract administrators, office managers, stenographers, plan clerks, file clerks, and draftsmen except to the extent that their time is actually spent on the Project and are identified on **Exhibit "D"**.
- 8.3.6.2. Outside services and their expenses for estimating, personnel, accounting, budget control, audit and management information systems (other than Preconstruction Services) relating to accounting in DESIGN-BUILD CONTRACTOR's office and even if at the Project site, except as specifically identified herein.
- 8.3.6.3. Interest on the DESIGN-BUILD CONTRACTOR's capital or on money borrowed by the DESIGN-BUILD CONTRACTOR, including the capital employed by the DESIGN-BUILD CONTRACTOR in the performance of the Work.
- 8.3.6.4. Amounts required to be paid by DESIGN-BUILD CONTRACTOR for Federal and/or State income and franchise taxes.
- 8.3.7 In addition to the payment procedures described in the General Conditions, the following payment procedures shall apply:
  - 8.3.7.1. The Schedule of Values may be revised from time to time to adjust allocations of costs to various line items as the costs become better known, but such adjustment shall be subject to the approval of the Director, which shall not be unreasonably withheld. Under no circumstances shall the Schedule of Values exceed a CGMP and/or the GMP for the Project. The DESIGN-BUILD CONTRACTOR's Fee, labor and expenses for General Conditions Work, labor and expenses for any self-performed Work, and the contingency shall be shown as separate line items on the Schedule of Values.
  - 8.3.7.2. The Schedule of Values submitted shall maintain the originally established value for each work classification line item, and shall contain any revisions to costs or cost estimates for each such classification. The format and tracking method of the original Schedule of Values and of all updates thereto shall be subject to the approval of Director.

- 8.3.7.3. Payment for DESIGN-BUILD CONTRACTOR's Fee shall be in the same proportion to the total fee as the amount requested for the Cost of the Work relative to the total Cost of the Work used in deriving the Guaranteed Maximum Price, inclusive of any CGMPs.
- 8.3.7.4. DESIGN-BUILD CONTRACTOR shall submit a monthly cost breakdown, including cost elements for staff labor and expenses over the duration of the construction period to Director for approval. Payment for DESIGN-BUILD CONTRACTOR's General Conditions shall be made on a monthly basis per the approved breakdown.
- 8.3.7.5. Payment for the Cost of the Work shall be made based on percentages of completion of each portion of the Work listed in Schedule of Values as of the end of the period covered by the Application for Payment, in accordance with the General Conditions.
- 8.3.7.6. Retainage as specified in the General Conditions will be applied to the entire amount requested including the Cost of the Work, the DESIGN-BUILD CONTRACTOR's Fee, and Preconstruction Phase Services, as applicable. Retainage will not be held on the cost of the City's standard "pass-through" items, such as building permits, payment and performance bonds and insurance costs. Retainage will be reduced for the Project and the Project will be closed out consistent with the relevant provisions of the General Conditions.
- 8.3.7.7. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work shall not exceed the unpaid balance of the Guaranteed Maximum Price (less retainage on Work previously completed).
- 8.3.7.8. Payments to Subcontractors shall be made based on the same percentage of Work completed that is allocable to that Subcontractor for each respective Schedule of Values classification including applicable retainage.
- With each application for payment, DESIGN-BUILD CONTRACTOR shall 8.3.7.9. submit a certified release of all claims, known or that should reasonably be known, and liens against the City, stating "In consideration for the payment requested herein and upon receipt of such payment, DESIGN-BUILD CONTRACTOR waives and releases all claims and liens of every sort against City relating to or arising out of the Work performed, except for such claims as have been properly submitted in writing in accordance with the Contract Documents." The final request for payment shall not be made until DESIGN-BUILD CONTRACTOR delivers to City a complete release by DESIGN-BUILD CONTRACTOR of all claims and liens of any sort arising out of the performance of the Work, affidavits from Subcontractors indicating they have been paid in full, other than amounts remaining to be paid to the DESIGN BUILD CONTRACTOR for Work performed by that Subcontractor (which amounts shall be stated), a complete release of all claims and liens from all Subcontractors (except that, as to amounts remaining to be paid to that Subcontractor, such release may be made contingent upon City making payment to DESIGN BUILD CONTRACTOR) and an affidavit that so far as DESIGN-BUILD CONTRACTOR has knowledge or information, the release includes and

covers all materials and services over which DESIGN-BUILD CONTRACTOR has control for which a lien could be filed, but DESIGN BUILD CONTRACTOR may, if any Subcontractor or consultant refuses to furnish a required affidavit or release, furnish a bond satisfactory to Director to indemnify City against any claim or lien of any sort and any related costs, including attorneys' fees. If any claim or lien of any sort remains unsatisfied after all payments are made, DESIGN-BUILD CONTRACTOR shall refund to City all moneys City may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees, and City shall have all remedies at law and in equity.

- 8.3.7.10. The aggregate total of payments to DESIGN-BUILD CONTRACTOR shall not exceed the total of the actual Cost of the Work as verified by Director from DESIGN-BUILD CONTRACTOR's final accounting plus the applicable DESIGN-BUILD CONTRACTOR's Fee as certified for payment in accordance with the Contract, but in no event more than the Guaranteed Maximum Price and approved Change Orders to Guaranteed Maximum Price plus Preconstruction Phase Fee. If payments made to DESIGN-BUILD CONTRACTOR exceed that which is due and owing pursuant to this **Article 8**, then DESIGN-BUILD CONTRACTOR shall promptly refund such excess to City.
- In addition to the City's other rights and any provision hereof to the contrary notwithstanding and to the extent reasonably necessary to protect itself, City shall not be obligated to make any payment (whether a progress payment or final payment) to DESIGN-BUILD CONTRACTOR hereunder if any one or more of the following conditions exist:
  - 8.3.8.1. The DESIGN-BUILD CONTRACTOR is in breach or default under this Contract;
  - 8.3.8.2. Any part of such payment is attributable to services, which are not performed in accordance with this Contract; provided, however, such payment shall be made as to the part thereof attributable to services which were performed in accordance with this Contract;
  - 8.3.8.3. The DESIGN-BUILD CONTRACTOR has failed to make payments promptly to Subcontractors or other third parties used in connection with the services for which City has made payment to DESIGN-BUILD CONTRACTOR; or
  - 8.3.8.4. If Director determines that the amount remaining under the Guaranteed Maximum Price will not be sufficient to complete the services in accordance with this Contract, no additional payments will be due DESIGN-BUILD CONTRACTOR hereunder unless and until DESIGN-BUILD CONTRACTOR, at DESIGN-BUILD CONTRACTOR's sole cost, performs a sufficient portion of the remaining services so that such portion of the amount remaining under the Guaranteed Maximum Price is determined by City to be sufficient to so complete the then remaining Work.
- 8.3.9 Nothing contained herein shall require the City to pay the DESIGN-BUILD CONTRACTOR an aggregate amount exceeding the Guaranteed Maximum Price or to make payment if in the City's belief the cost to complete the Work would exceed

- the Guaranteed Maximum Price less previous payments to DESIGN-BUILD CONTRACTOR.
- 8.3.10 No partial payment made hereunder shall be, or shall be construed to be, final acceptance or approval of that part of the Work to which such partial payment relates, or a release of DESIGN-BUILD CONTRACTOR of any of DESIGN-BUILD CONTRACTOR's obligations hereunder or liabilities with respect to such Work.
- 8.3.11 DESIGN-BUILD CONTRACTOR shall promptly pay all bills validly due and owing for labor and material performed and furnished by DB-Related Entities in connection with the performance of the Preconstruction and Construction Phase Services.
- 8.3.12 City shall have the right to verify and audit for a period of seven years after final payment for the Construction Phase, the details set forth in DESIGN-BUILD CONTRACTOR's billings, certificates, accountings, cost data, and statements, including all underlying costs and expenses in the Cost of the Work, either before or after payment therefor, by (1) inspecting the books and records of DESIGN-BUILD CONTRACTOR with respect to the Project during normal business hours; (2) examining any reports with respect to this Project; (3) interviewing DESIGN-BUILD CONTRACTOR's business employees; (4) visiting the Project site; and (5) other reasonable action. City shall have the right to audit all costs, the basis for those costs, and all underlying expenses relating to DESIGN-BUILD CONTRACTOR's performance herein, including but not limited to, the Cost of the Work, particularly, without limitation, labor rates and hourly salary rates set forth in **Exhibit "D"**.
- 8.3.13 DESIGN-BUILD CONTRACTOR shall establish and maintain a reasonable accounting system that enables the City to readily identify DESIGN-BUILD CONTRACTOR's assets, expenses, costs of goods, and use of funds. The City and its authorized representatives shall have the right to audit, to examine, and to make copies of or extracts from all financial and related records (in whatever form they may be kept, whether written, electronic, or other) relating to or pertaining to this Contract kept by or under the control of the DESIGN-BUILD CONTRACTOR, including, but not limited to those kept by the DESIGN-BUILD CONTRACTOR, its employees, agents, assigns, successors, and subcontractors. Such records shall include, but not be limited to, accounting records, written policies and procedures; subcontract files (including proposals of successful and unsuccessful bidders, bid recaps, etc.); all paid vouchers including those for out-of-pocket expenses; other reimbursement supported by invoices; ledgers; cancelled checks; deposit slips; bank statements; journals; original estimates; estimating work sheets; contract amendments and change order files; backcharge logs and supporting documentation; insurance documents; payroll documents; timesheets; memoranda; and correspondence.
- 8.3.14 DESIGN-BUILD CONTRACTOR shall, at all times during the term of this Contract and for a period of seven years after the termination or completion of this Contract, maintain such records, together with such supporting or underlying documents and materials. The DESIGN-BUILD CONTRACTOR shall at any time requested by the City, whether during or after completion of this Contract, and at DESIGN-BUILD CONTRACTOR's own expense make such records available for inspection and audit (including copies and extracts of records as required) by the City. Such records shall be made available to the City during normal business hours at the DESIGN-BUILD

CONTRACTOR's office or place of business and subject to a three day written notice. In the event that no such location is available, then the financial records, together with the supporting or underlying documents and records, shall be made available for audit at a time and location that is convenient for the City.

- 8.3.15 DESIGN-BUILD CONTRACTOR shall ensure the City has these rights with DESIGN-BUILD CONTRACTOR's employees, agents, assigns, successors, and subcontractors, and the obligations of these rights shall be explicitly included in any subcontracts or agreements formed between the DESIGN-BUILD CONTRACTOR and any subcontractors to the extent that those subcontracts or agreements relate to fulfillment of the DESIGN-BUILD CONTRACTOR's obligations to the City. Costs of any audits conducted under the authority of this right to audit and not addressed elsewhere will be borne by the City unless the audit identifies overpricing or overcharges (of any nature) by the DESIGN-BUILD CONTRACTOR to the City in excess of one-half of one percent (.5%) of the total contract billings, the DESIGN-BUILD CONTRACTOR shall reimburse the City for the costs of the audit up to the amount of overpricing or overcharges. If the audit discovers substantive findings related to fraud, misrepresentation, or non-performance, the City may recoup the costs of the audit work from the DESIGN-BUILD CONTRACTOR. Any adjustments and/or payments that must be made as a result of any such audit or inspection of the DESIGN-BUILD CONTRACTOR's invoices and/or records shall be made within a reasonable amount of time (not to exceed 90 days) from presentation of the City's findings to DESIGN-BUILD CONTRACTOR.
- acceptance by DESIGN-BUILD CONTRACTOR or DESIGN-BUILD 8.3.16 The CONTRACTOR's successors of final payment under this Contract, shall constitute a full and complete release of City from any and all claims, demands, and causes of action whatsoever which DESIGN-BUILD CONTRACTOR or DESIGN-BUILD CONTRACTOR's successors have or may have against City under the provisions of this Contract except those previously made in writing and identified by DESIGN-BUILD CONTRACTOR as unsettled at the time of the final request for payment in a Claims" document captioned "Unsettled included with **DESIGN-BUILD** CONTRACTOR's final request for payment.

#### 8.4 Cost of the Work.

8.4.1 Definition. The term Cost of the Work means actual costs of Phase 2 – Construction plus any actual costs for Advanced Package Work, excluding mark-up, which the DESIGN-BUILD CONTRACTOR necessarily incurs to properly perform the Work in strict compliance with the Contract Documents. Such costs shall be at rates and amounts not higher than the standard paid at the place of the Project except with the prior written consent of Director to that specific rate or amount being higher than the standard. Cost of the Work shall not include costs not necessarily incurred or incurred at higher than permitted rates or amounts. Cost of the Work includes only the items set forth in this Section, which shall all be subject to verification by audit.

#### 8.4.2 Labor Costs.

8.4.2.1. Actual hourly wages paid to construction workers directly employed by DESIGN-BUILD CONTRACTOR who perform construction of the Work at the Project site or, with the Director's written agreement, at off-site

workshops. DESIGN-BUILD CONTRACTOR shall provide certified payrolls and any other documentation requested by City to verify wages and hours, and compliance with the City's wage rates identified in **Exhibit** "H". Actual wages paid may include premium payments for overtime work or night work for time actually spent in the performance of the Work when such premium payments have been demonstrated to be in accordance with the DESIGN-BUILD CONTRACTOR's normal business practice and is included in the Guaranteed Maximum Price. Premium time shall not accrue prior to the completion of 40 hours per week of work by any given individual.

8.4.2.2. Actual wages or salaries (inclusive of Labor Burden) of DESIGN-BUILD CONTRACTOR's supervisory and administrative personnel who are identified on Exhibit "D" together with their Allowable Hourly Rate - but only for documented time when directly involved in performance of the Allowable Hourly Rate means the rate for a particular staff classification identified in Exhibit "D", which includes actual wages or salaries (inclusive of Labor Burden). The salaries of DESIGN-BUILD CONTRACTOR's supervisory personnel are subject to a not-to-exceed increase of \_\_% per year; the first year beginning on the date that Director approves DESIGN-BUILD CONTRACTOR's Construction Phase Maximum Guaranteed Price proposal. The % increase shall be available to DESIGN-BUILD CONTRACTOR each year thereafter not to exceed seven years or at the completion or termination of this Contract, whichever occurs first. The annual not-to-exceed increase of \( \bigvere \)% is available hereunder only to the extent it reflects a concurrent and equal increase in the supervisory personnel's salaries or wages. Any increase or portion thereof not used in a given year shall expire and does not "bank" or "accumulate." Notwithstanding, Cost of the Work for purposes of calculating payment for DESIGN-BUILD CONTRACTOR's supervisory and administrative personnel when directly involved in performance of the Work shall be based on the "actual hourly pay rate" set forth in Exhibit "D". Projected wage increases should be reflected in the Guaranteed Maximum Price Proposal. Actual wages paid may include premium payments for overtime work or night work for time actually spent in the performance of the Work when such premium payments have been demonstrated to be in accordance with the DESIGN-BUILD CONTRACTOR's normal business practice and is included in the Guaranteed Maximum Price. Premium time shall not accrue prior to the completion of 40 hours per week of work by any given individual. Labor Burden for overtime payments shall be eliminated or reduced to equal the DESIGN-BUILD CONTRACTOR's actual substantiated cost for such Should DESIGN-BUILD CONTRACTOR require employees. other than those listed on Exhibit "D", DESIGN-BUILD CONTRACTOR shall provide written notice to the Director setting forth all the information described above. If for any reason, Director reasonably objects to any such employee, DESIGN-BUILD CONTRACTOR shall not use that employee to perform on the Project. Failing reasonable objection by the Director, the employee, together with the employee's daily billing rate, shall automatically become a part of **Exhibit "D"**. The Labor Burden rate shall be based on the actual cost of direct wages or salaries of DESIGN-

BUILD CONTRACTOR's employees incurred in the interest of the Project. For billing purposes only, this rate shall be established annually, subject to verification by the City's auditors based on the DESIGN-BUILD CONTRACTOR's Labor Burden for the previous year. The components which comprise the Labor Burden shall not change throughout the term of the Project. The City shall be allowed to audit the actual cost of labor burden each year, and City shall be entitled to a refund to the extent that it has paid DESIGN-BUILD CONTRACTOR more than its actual Labor Burden costs. Initially, the labor burden will be set at \_\_\_\_\_\_% subject to verification by the City's auditors. It will be reset each year based on the audited rate for the prior year. Under no circumstances shall the City pay more for labor burden than the percentage established for billing purposes for any given year. Labor Burden for overtime payments shall be eliminated or reduced to equal the DESIGN-BUILD CONTRACTOR's actual substantiated cost for such burden.

- 8.4.2.3. Actual out of town travel expenses of DESIGN-BUILD CONTRACTOR's personnel incurred directly and solely in support of the Project with prior written approval of the Director or specifically identified in the negotiated cost proposal but only to the extent permitted by City's policies on reimbursement for travel.
- 8.4.2.4. Actual costs paid or incurred by DESIGN-BUILD CONTRACTOR for labor costs arising out of taxes, insurance, and benefits which are (i) required by law, (ii) required by collective bargaining agreements, (iii) or as otherwise customary so long as such costs are based on the actual wages of construction workers properly included in the Cost of the Work as defined herein and are approved in advance by the Director.

#### 8.4.3 Subcontractor Costs

- 8.4.3.1. Payments actually made by DESIGN-BUILD CONTRACTOR to Subcontractors for prosecution of the Work, including Designer, in accordance with the requirements of their agreements with DESIGN-BUILD CONTRACTOR, but only for agreements to the extent they have been specifically consented to in writing by Director. Consent to such agreements shall not create any liability for City and shall not excuse DESIGN-BUILD CONTRACTOR from complying with the terms of this Contract.
- 8.4.4 Costs of Materials and Equipment Incorporated in the Completed Construction
  - 8.4.4.1. Costs, including transportation, of materials and equipment incorporated or to be incorporated into the Work.
  - 8.4.4.2. Costs of materials described in the preceding subparagraph in excess of those actually installed but required to provide reasonable allowance for waste and for spoilage. City shall be entitled to take possession of excess materials not incorporated into the Work, or at Director's option, DESIGN-BUILD CONTRACTOR shall sell such materials and deduct the gross proceeds from the Cost of the Work.

- 8.4.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items
  - 8.4.5.1. Costs, including transportation, installation, maintenance, dismantling and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the construction workers, which are provided by DESIGN-BUILD CONTRACTOR at the site and fully consumed in the performance of the Work; and if not fully consumed, then the cost shall be based on the cost of the item less its fair market value. Cost for items previously used by DESIGN-BUILD CONTRACTOR shall mean fair market value prior to use on the Project. The cost for hand and small tools shall not exceed 3% of the direct payroll costs for employees of DESIGN-BUILD CONTRACTOR.
  - 8.4.5.2. Rental charges for temporary facilities, machinery, equipment, excluding hand tools which are provided at the Project site, whether rented from DESIGN-BUILD CONTRACTOR or others, and costs of transportation, installation, minor repairs and replacements, dismantling and removal thereof. The aggregate rental charges for an item used on this Project (including the rental charges for items used to replace it) shall not under any circumstances exceed 75% of the value of that item or 75% of any applicable option purchase price, whichever is lower. Machinery and equipment owned by DESIGN-BUILD CONTRACTOR or any person affiliated with or owned or controlled by DESIGN-BUILD CONTRACTOR or persons affiliated with DESIGN-BUILD CONTRACTOR shall not be charged at more than the market rate for such equipment in the Houston area or 90% of current published rental rates of the Associated Equipment Dealers, for such equipment, whichever is less.
  - 8.4.5.3. Costs of removal of debris from the Project site.
  - 8.4.5.4. Costs of postage and parcel delivery charges, standard and reasonable telephone service at the Project site and reasonable petty cash expenses of the Project site office, incurred directly and solely in support of the Work, and all incurred at the Project site.
  - 8.4.5.5. That portion of the reasonable travel and subsistence expenses of DESIGN-BUILD CONTRACTOR's personnel that are consistent with the City's travel policies and incurred while traveling solely in the discharge of duties directly connected with the Work, but not including travel expenses or commuting expenses incurred within Houston and its extra-territorial jurisdiction.
  - 8.4.5.6. Area specific site periodic and final clean up, not previously included, and in accordance with all Applicable Laws and regulations.
  - 8.4.5.7. Any hazardous materials handling, abatement, and disposal cost(s).
- 8.4.6 Lump Sum Agreed Costs
  - 8.4.6.1 Where agreed by the Director and DESIGN-BUILD CONTRACTOR, any costs under a lump sum agreement for completion of said task.

#### 8.4.7 Miscellaneous Costs

- 8.4.7.1. Sales, use, or similar taxes imposed by a governmental authority that are related to the Work and for which DESIGN-BUILD CONTRACTOR is liable. Notwithstanding, City is a home-rule municipal corporation and DESIGN-BUILD CONTRACTOR shall avail itself of all exemptions which may exist for such taxes based on City's status.
- 8.4.7.2. Fees and assessments for building permits and for other permits and inspections that DESIGN-BUILD CONTRACTOR is required by the Contract Documents to pay for or obtain.
- 8.4.7.3. Except as set forth in Section 11.2, premiums for insurance and bonds to the extent directly attributable to this Contract, including, without limitation, professional liability and pollution insurance. Any premium allocation plan to this Project by DESIGN-BUILD CONTRACTOR must be approved by the City's Legal Department.
- 8.4.7.4. Testing fees pursuant to the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded.
- 8.4.7.5. Intellectual property royalties and licenses for items specifically required by the Contract Documents which are, or will be, incorporated into the If a particular design, process, or product of a particular manufacturer is required by City, then costs of payments made in accordance with legal judgments against **DESIGN-BUILD** CONTRACTOR resulting from suits for such infringement, payments of settlements made with City's written consent, and reasonable legal fees related to the infringement are eligible as a Cost of the Work and shall not be included in the calculation of DESIGN-BUILD CONTRACTOR's Fee or the Guaranteed Maximum Price (but shall still be subject to the limit covered by the Appropriated Funds). Notwithstanding the foregoing, if DESIGN-BUILD CONTRACTOR had reason to believe the required design, process, or product is an infringement, such payments and fees shall not be a Cost of the Work and DESIGN-BUILD CONTRACTOR shall be responsible for such payments, fees and losses unless DESIGN-BUILD CONTRACTOR notifies Director of the potential infringement promptly before proceeding and in writing.
- 8.4.7.6. Utility company charges including meter fees, tap fees and utility consumption charges.
- 8.4.7.7. Contingency allowed by the Contract Documents, and identified as a line item in the Schedule of Values.
- 8.4.7.8. Costs of cell phones and vehicles, not otherwise included in the Labor Burden, for those employees approved by the Director.

- 8.4.7.9. Costs of on-site computers, printers, monitors, software, maintenance and other electronic equipment approved in advance and in writing by the Director, used solely for the Project
- 8.4.7.10. That portion of the cost of subcontractor default insurance or similar product for enrolled subcontractors or suppliers, which comprises only the risk transfer premium, and not prefunded deductibles or any other deposits, prepayments or charges of any type, and only as agreed to in advance by the Director following full transparency into the policy and the charges.
- 8.4.7.11. Other costs approved in advance in writing by Director at Director's sole option and discretion.

#### 8.5 Costs Not Included in the Cost of the Work.

- 8.5.1 The Cost of the Work shall not include the items listed in this Section:
  - 8.5.1.1. Except as provided in Section 8.4.2, salaries and other compensation of DESIGN-BUILD CONTRACTOR's personnel stationed at DESIGN-BUILD CONTRACTOR's principal office or offices other than the Project site office.
  - 8.5.1.2. Expenses of DESIGN-BUILD CONTRACTOR's principal office and offices other than the Project Site office.
  - 8.5.1.3. Overhead and general expenses.
  - 8.5.1.4. Markup imposed by DESIGN-BUILD CONTRACTOR on other direct costs (ODCs) such as reimbursable expenses and pass-through costs from DESIGN-BUILD CONTRACTOR and its Subcontractors and Suppliers.
  - 8.5.1.5. DESIGN-BUILD CONTRACTOR's capital expenses, including interest on DESIGN-BUILD CONTRACTOR's capital employed for the Work.
  - 8.5.1.6. Rental costs of machinery and equipment, except as specifically provided in this Contract.
  - 8.5.1.7. Costs due in whole or in part to the fault or negligence of DESIGN-BUILD CONTRACTOR, Subcontractors, anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to costs of the correction of damaged, defective or nonconforming Work, disposal and replacement of materials and equipment incorrectly ordered or supplied, and making good damage to property.
  - 8.5.1.8. Costs of entertainment.
  - 8.5.1.9. Costs incurred or that should have been incurred for Preconstruction Phase Services.

- 8.5.1.10. Any legal, accounting, professional, or other similar costs incurred by DESIGN-BUILD CONTRACTOR, including costs incurred in connection with the prosecution or defense of any dispute, mediation, arbitration, litigation, or other proceeding related to or arising from the Project.
- 8.5.1.11. Any sales, use, income, franchise, and similar taxes paid by DESIGN-BUILD CONTRACTOR. Any fines, penalties, sanctions, or other levies assessed by any governmental body against DESIGN-BUILD CONTRACTOR.
- 8.5.1.12. The cost of any and all insurance deductibles and self-insured retentions payable by DESIGN-BUILD CONTRACTOR, and all uninsured losses and costs, whether due to the failure of DESIGN-BUILD CONTRACTOR or any Subcontractor to procure and maintain insurance as and to the extent required by the Contract Documents, or otherwise.
- 8.5.1.13. Costs that would cause the Guaranteed Maximum Price to be exceeded.
- 8.5.1.14. All profit, profit expectations and costs associated with profit sharing plans such as personnel bonuses, incentives, and rewards, company stock options, or any other like expenses of DESIGN-BUILD CONTRACTOR.
- 8.5.1.15. Legal and administrative costs to review and negotiate this Contract and all other Contract Documents.
- 8.5.1.16. Costs incurred by DESIGN-BUILD CONTRACTOR resulting from the failure of DESIGN-BUILD CONTRACTOR or its Subcontractors to coordinate their work with that of City and its other contractors, if any, after agreeing to schedules therefor.
- 8.5.1.17. Liquidated damages imposed by City.
- 8.5.1.18. Any costs arising out of the intentional acts or negligence of DESIGN-BUILD CONTRACTOR, its Subcontractors, or any person or entity for whom any of them may be liable, including, without limitation, costs related to defective, rejected, or nonconforming Work within the Contract Time.
- 8.5.1.19. Costs including, but not limited to, the failure to perform of any Subcontractor or the bankruptcy or insolvency of any Subcontractor.
- 8.5.1.20. Costs for licenses, re-inspections and improperly timed permits and inspections.
- 8.5.1.21. Costs related to warranty work.
- 8.5.1.22. Costs associated with deferred compensation and bonuses.
- 8.5.1.23. Costs associated with Subcontractor default insurance or similar products, except for the actual risk transfer premium as specifically allowed in Section 8.4.

- 8.5.1.24. Any other cost not specifically and expressly described in this Contract as a Cost of the Work.
- 8.5.1.25. Notwithstanding anything in the Contract Documents to the contrary, the Lump Sum fee for DESIGN-BUILD CONTRACTOR'S Preconstruction Phase and Design Services and/or other costs or expenses for DESIGN-BUILD CONTRACTOR'S Design Services shall not be included in the Cost of the Work.
- 8.6 **Discounts, Rebates and Refunds of the Cost of the Work.** The Cost of the Work to be paid by City shall be credited with the following items:
  - 8.6.1 Proceeds of the sale of all tools, surplus materials, construction equipment, and temporary structures which have been charged to the Work other than by way of rental, and remaining after completion, whether such sale is made to the City, the DESIGN-BUILD CONTRACTOR, or to some other party; and any such sale, if made to others than the City, shall be at fair market price. Upon completion of the Work or when no longer required, all tools, construction equipment and materials charged to the Cost of the Work shall be sold by DESIGN-BUILD CONTRACTOR (unless turned-over to the City as set forth above) and the DESIGN-BUILD CONTRACTOR shall use its best efforts to obtain the highest price in respect of such sales.
  - 8.6.2 If City makes funds available to DESIGN-BUILD CONTRACTOR, discounts earned by the DESIGN-BUILD CONTRACTOR through advance or prompt payments. DESIGN-BUILD CONTRACTOR shall provide sufficient advance notice of available discounts and the need for funds to be available to the City for the City to obtain the benefit of the discounts. The DESIGN-BUILD CONTRACTOR shall obtain all possible trade and time discounts on bills for material furnished, and shall pay said bills within the highest discount periods. The DESIGN-BUILD CONTRACTOR shall purchase materials for this Project in such quantities as will provide the most advantageous prices to the City.
  - 8.6.3 Reasonable market value as approved by the Director at the time of removal of all materials, tools, and equipment actually purchased for the Work and charged as a Cost of the Work and which is retained by the DESIGN-BUILD CONTRACTOR upon completion of the Work.
  - 8.6.4 Rebates, discounts, or commissions allowed to and collected by the DESIGN-BUILD CONTRACTOR from suppliers of materials or from Subcontractors, together with all other refunds, returns, or credits received for return of materials, or on bond premiums, dividends or other compensation received from the surety or insurance and sales taxes.
  - 8.6.5 DESIGN-BUILD CONTRACTOR shall reimburse City for deposits made by City and not returned to City due to the negligent or intentional acts of the DESIGN-BUILD CONTRACTOR. Should DESIGN-BUILD CONTRACTOR not promptly so reimburse City upon demand, City shall be entitled to recover said amount from DESIGN-BUILD CONTRACTOR, including, but not limited to, by deducting the amount from payments due the DESIGN-BUILD CONTRACTOR.

# 8.7 **Limit of Appropriation.**

- 8.7.1 The City's duty to pay money to the DESIGN-BUILD CONTRACTOR for any purpose under this Contract is limited in its entirety by the provisions of this Section.
- 8.7.2 In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has allocated the sum of for Preconstruction Phase and Design Services and for Advanced Packages as Appropriated Funds to pay money due under this Contract for Work, as may be required (the "Original Appropriation"). The executive and legislative officers of the City, in their sole discretion, may appropriate additional funds for this Contract (the "Supplemental Appropriation"), but they are not obligated to do so.
- 8.7.3 The aggregate of all sums duly authorized by the City to be allocated to pay money due under this Contract, including the Original Appropriation and all Supplemental Appropriations, constitute the Appropriated Funds. The City shall never be obligated to pay any money under this Contract in excess of the Appropriated Funds. The DESIGN-BUILD CONTRACTOR must assure itself that sufficient Appropriated Funds have been made to pay for services it provides. If Appropriated Funds are exhausted, the DESIGN-BUILD CONTRACTOR's only remedy is suspension or termination of its performance under this Contract and the DESIGN-BUILD CONTRACTOR has no other remedy in law or in equity against the City and no right to damages of any kind.
- 8.7.4 The DESIGN-BUILD CONTRACTOR shall closely monitor expenditures under this Contract and shall notify the Director when amounts payable by the City hereunder for authorized Work are equal to 80% of the Appropriated Funds, even if such amounts payable have not yet been billed to the City. At such point, if additional amounts payable by the City hereunder for the DESIGN-BUILD CONTRACTOR's continued performance of the authorized Work would exceed the amount of remaining Appropriated Funds, the DESIGN-BUILD CONTRACTOR has the right to suspend performance of the authorized Work by seven days' advance written notice to the Director describing the cause and the DESIGN-BUILD CONTRACTOR's planned suspension. Once Appropriated Funds have been increased, the DESIGN-BUILD CONTRACTOR shall resume performance of the authorized Work and may be entitled to equitable adjustment in accordance with the applicable provisions of the Contract Documents. If after more than 180 days Appropriated Funds have not been increased, the DESIGN-BUILD CONTRACTOR shall have the right to terminate its performance in accordance with the applicable provisions of the However, termination shall not relieve DESIGN-BUILD Contract Documents. CONTRACTOR of its continuing obligations to the City already incurred. The City shall not under any circumstances be obligated to seek a Supplemental Appropriation.

## **ARTICLE 9. REPRESENTATIONS AND WARRANTIES**

- 9.1 **Representations and Warranties of the City**. The City represents and warrants that:
  - 9.1.1 The City is a home-rule city in the State of Texas, with full legal right, power and authority to enter into and to perform its obligations under this Contract.
  - 9.1.2 This Contract has been duly authorized, executed and delivered by all necessary action of the City and constitutes a legal, valid, and binding obligation of the City, enforceable against the City in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code and by equitable principles of general application.
- 9.2 **Representations and Warranties of the DESIGN-BUILD CONTRACTOR**. In addition to any other representations and warranties made by the DESIGN-BUILD CONTRACTOR hereunder, the DESIGN-BUILD CONTRACTOR represents and warrants that:
  - 9.2.1 The DESIGN-BUILD CONTRACTOR is a [type of legal entity], duly organized, validly existing, and in good standing under the laws of Texas. The DESIGN-BUILD CONTRACTOR has the authority to do business in the State of Texas and in any state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under this Contract.
  - 9.2.2 This Contract has been duly authorized, executed and delivered by all necessary corporate action of the DESIGN-BUILD CONTRACTOR and constitutes a legal, valid and binding obligation of the DESIGN-BUILD CONTRACTOR, enforceable against the DESIGN-BUILD CONTRACTOR in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code or by equitable principles of general application.
  - 9.2.3 To the best of its knowledge after due inquiry, neither the execution nor delivery by the DESIGN-BUILD CONTRACTOR of this Contract nor the performance by the DESIGN-BUILD CONTRACTOR of its obligations in connection with the transactions contemplated hereby nor the fulfillment by the DESIGN-BUILD CONTRACTOR of the terms or conditions hereof: (a) conflicts with, violates, or results in a breach of any constitution, law, governmental regulation, by-laws, or certificates of incorporation applicable to the DESIGN-BUILD CONTRACTOR; or (b) conflicts with, violates or results in a breach of any order, judgment, or decree, or any contract, agreement, or instrument to which the DESIGN-BUILD CONTRACTOR is a party or by which the DESIGN-BUILD CONTRACTOR or any of its properties or assets are bound, or constitutes a default under any of the foregoing.
  - 9.2.4 No approval, authorization, order or consent of, or declaration, registration, or filing with, any Governmental Authority is required for the valid execution and delivery of this Contract by the DESIGN-BUILD CONTRACTOR except as such have been duly obtained or made.
  - 9.2.5 Except as disclosed in writing to the City, there is no legal proceeding, at law or in equity, before or by any court, arbitral tribunal, or other Governmental Authority pending or, to the best of the DESIGN-BUILD CONTRACTOR's knowledge after due inquiry, overtly threatened or publicly announced against the DESIGN-BUILD

CONTRACTOR, in which an unfavorable decision, ruling, or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Contract by the DESIGN-BUILD CONTRACTOR or the validity, legality, or enforceability of this Contract against the DESIGN-BUILD CONTRACTOR, or any other agreement or instrument entered into by the DESIGN-BUILD CONTRACTOR in connection with the transactions contemplated hereby, or on the ability of the DESIGN-BUILD CONTRACTOR to perform its obligations hereunder or under any such other agreement or instrument.

- 9.2.6 Except as disclosed in writing to the City, there are no material and adverse claims or demands based in environmental, contract, or tort law pending or threatened against the DESIGN-BUILD CONTRACTOR or any of its Affiliates with respect to any facilities designed or constructed by the DESIGN-BUILD CONTRACTOR or any of its Affiliates that would have a material and adverse effect upon the ability of the DESIGN-BUILD CONTRACTOR to perform the Work.
- 9.2.7 Neither the DESIGN-BUILD CONTRACTOR nor any of its Affiliates has any knowledge of any material violation of any law, order, rule, or regulation with respect to any facilities designed or constructed by the DESIGN-BUILD CONTRACTOR or any of its Affiliates.
- 9.2.8 The information supplied and representations and warranties made by the DESIGN-BUILD CONTRACTOR in all submittals made in response to the RFQ with respect to the DESIGN-BUILD CONTRACTOR (and to its knowledge, all information supplied in such submittals with respect to any Affiliate or DB-Related Entity) are true, correct, and complete in all material respects.
- 9.2.9 The DESIGN-BUILD CONTRACTOR is under no obligation, commitment or impediment of any kind, whether contractual or otherwise, that will limit or prevent performance of its obligations under this Contract.
- 9.2.10 The DESIGN-BUILD CONTRACTOR is financially secure and no action relating to the Bankruptcy Code or suspension of payments by the DESIGN-BUILD CONTRACTOR or any Affiliate has, to the best of its knowledge after due inquiry, been taken or is threatened.

## 9.2.11 The DESIGN-BUILD CONTRACTOR:

- 9.2.11.1. has examined, carefully studied, and thoroughly understands the Contract Documents;
- 9.2.11.2. has visited the Project site and has become familiar with and is satisfied as to the general, local, and Project Site conditions that may affect cost, progress, and performance of the Work;
- 9.2.11.3. is familiar with and is satisfied as to all Applicable Laws that may affect cost, progress, and performance of the Work;
- 9.2.11.4. has carefully studied all information concerning the Project site and the performance of the Work which have been identified or made available by the City prior to the Effective Date; and

9.2.11.5. is prepared to perform the Work in accordance with Contract Standards and subject to the terms and conditions of the Contract Documents.

## ARTICLE 10. MWBE COMPLIANCE

10.1 DESIGN-BUILD CONTRACTOR shall comply with the City's Minority, Women and Small Business Enterprise ("MWSBE") programs as set out in Chapter 15 of the City of Houston Code of Ordinances. DESIGN-BUILD CONTRACTOR shall make good faith efforts to award subcontracts or supply agreements to MWSBEs as follows: \_\_\_\_\_\_% M/WBE for design and professional services; \_\_\_\_\_\_% MBE for Phase 2 Construction Services, and \_\_\_\_\_\_% WBE for Phase 2 Construction Services. DESIGN-BUILD CONTRACTOR acknowledges that it has reviewed the requirements for good faith efforts on file with the City's Office of Business Opportunity and will comply with them.

#### ARTICLE 11. BONDS AND INSURANCE

- 11.1 Within 10 days of the date the DESIGN-BUILD CONTRACTOR executes this Contract, DESIGN-BUILD CONTRACTOR shall provide performance and payment bonds on forms prescribed by City in **Exhibit "G"**, unless in the discretion of the Director, the DESIGN-BUILD CONTRACTOR furnishes a security bond acceptable to the Director to ensure that the DESIGN-BUILD CONTRACTOR will furnish the required performance and payment bonds when a CGMP or the GMP is established. The penal sum of the payment and performance bonds shall be equal to the construction budget, as specified in the request for qualifications, or as otherwise specified by the Director.
- 11.2 DESIGN-BUILD CONTRACTOR shall cause its design professional(s) to purchase and maintain professional liability, worker's compensation, automobile liability, commercial general liability and excess insurance, covering the Preconstruction Phase Services and Construction Phase Services provided under this Contract, as is acceptable to and approved by the Director. The insurance shall have minimum policy limits set forth in Article 11 of the General Conditions. The premium for the insurance will be at no expense to the City. DESIGN-BUILD CONTRACTOR shall cause its design professional(s) to maintain the insurance throughout the course of the Work and for a minimum of two years following the Date of Substantial Completion. Each design professional's professional liability insurance policy is required to be furnished to the Director prior to performance. No policy providing the insurance shall be cancelled, materially altered, or allowed to expire without 30 days' prior written notice to Director.
- 11.3 Prior to commencing the Work, DESIGN-BUILD CONTRACTOR shall be required to purchase and maintain the insurance coverages set forth in Article 11 of the General Conditions; provided however, that DESIGN-BUILD CONTRACTOR may delay purchase and maintenance of Owner's and Contractor's Protective Liability, Installation Floater, and Property and Casualty Coverage until no later than 10 days of the date the Director accepts a CGMP and/or the GMP Submittals, as applicable. The DESIGN-BUILD CONTRACTOR shall not commence Construction Phase Services unless all insurance coverages set forth in Article 11 of the General Conditions are in full force and effect.
- 11.4 DESIGN-BUILD CONTRACTOR shall not request payment, and City shall not be required to pay for DESIGN-BUILD CONTRACTOR's additional general liability insurance, builder's all risk insurance or any other form of insurance coverage that is in excess of the required coverage amounts specified in this Contract and in Article 11 of the General Conditions, and City shall be entitled to repayment of any amounts paid in excess of what City is required to pay. The additional

costs for coverages in addition to those coverages specifically required by this Contract shall be the sole responsibility of DESIGN-BUILD CONTRACTOR.

- 11.5 City reserves the right to review the insurance requirements set forth in this Article and the General Conditions during the effective period of the Contract and to make reasonable adjustments to the insurance coverages and their limits when deemed necessary and prudent by City based upon changes in statutory law, court decisions, or the claims history of the industry or DESIGN-BUILD CONTRACTOR. DESIGN-BUILD CONTRACTOR shall use its best efforts to comply with City's requests hereunder, and a Change Order shall be issued compensating DESIGN-BUILD CONTRACTOR for the increased costs of insurance premiums incurred as a result thereof.
- 11.6 City shall be entitled, upon request, and without expense, to receive copies of the policies and all endorsements thereto and may make any reasonable requests for deletion, or revision or modification of particular policy terms, conditions, limitations, or exclusions, except where policy provisions are established by law or regulation binding upon either of the Parties or the underwriter of any of such polices or to the extent that such deletion, revision, or modification results in increased costs for insurance premiums and City does not agree to compensate DESIGN-BUILD CONTRACTOR for such increased costs after receiving notice from DESIGN-BUILD CONTRACTOR of such increased costs. To the extent the losses should have been covered by insurance required by the Contract Documents that DESIGN-BUILD CONTRACTOR failed to provide, then actual losses not covered by insurance as required by this Article shall be paid by the DESIGN-BUILD CONTRACTOR.
- 11.7 DESIGN BUILD CONTRACTOR shall also procure Pollution Liability Insurance as authorized and approved by the Director, to provide insurance coverage for DESIGN BUILD CONTRACTOR with respect to its obligations, if any, whether included in the GMP, directed or agreed to by change order for hazardous materials abatement, handling and disposal. The actual limits will be reviewed and mutually agreed upon as part of the establishment of the GMP.

#### **ARTICLE 12. TERMINATION AND SUSPENSION**

- 12.1 Termination rights shall be as provided in the General Conditions and Applicable Laws.
- 12.2 The City's termination of this Contract shall not relieve the DESIGN-BUILD CONTRACTOR or any of its employees of liability for violations of this Contract, any act or omission, or negligence of the DESIGN-BUILD CONTRACTOR.
- 12.3 As of the date of termination of this Contract, the DESIGN-BUILD CONTRACTOR shall furnish to Director all statements, accounts, reports and other materials as are required hereunder or as have been prepared by the DESIGN-BUILD CONTRACTOR in connection with the DESIGN-BUILD CONTRACTOR's responsibilities hereunder. City shall have the right to use the ideas and designs therein contained for the completion of the services described by this Contract, and for completion of the Project, or otherwise. All drawings, plans, specifications, renderings and models, etc., prepared by the Designer are the property of City. They are not to be used by any person or entity other than City on other projects unless expressly authorized by City in writing prior to such use.

#### **ARTICLE 13. MISCELLANEOUS PROVISIONS**

- 13.1 **Exhibits**. All exhibits hereto are hereby incorporated herein by reference.
- 13.2 **Assignments**. This Contract is a personal service contract for the services of DESIGN-BUILD CONTRACTOR, and DESIGN-BUILD CONTRACTOR's interest in this Contract, duties hereunder and/or fees due hereunder may not be assigned or delegated to a third party, except as provided by the Texas Business and Commerce Code.
- 13.3 Entire Contract; Modifications; Conflicts. This Contract supersedes all prior agreements, written or oral, between DESIGN-BUILD CONTRACTOR and City and shall constitute the entire Contract and understanding between the parties with respect to the subject matter hereof. This Contract and each of its provisions shall be binding upon the Parties and may not be waived, modified, amended, or altered except by a writing signed by City and DESIGN-BUILD CONTRACTOR. If there is a conflict between this Contract and the General Conditions, then the provision which provides the greatest benefit to City shall govern.
- 13.4 **Captions**. The captions of paragraphs in this Contract are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction. DESIGN-BUILD CONTRACTOR and City shall both be deemed equally to be the drafters of the Contract Documents, and the Contract Documents shall not be construed against City or DESIGN-BUILD CONTRACTOR as the drafter.
- 13.5 **Governing Law**. This Contract and all of the rights and obligations of the Parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas. Exclusive venue for litigation shall be located in Harris County, Texas.
- 13.6 **Non-Waiver**. If either Party fails to require the other to perform a term of this Contract, that failure does not prevent the Party from later enforcing that term and all other terms. If either Party waives the others' breach of a term, that waiver does not waive a later breach of this Contract. An approval or direction by the Director, or by any other employee or agent of the City, of any part of DESIGN-BUILD CONTRACTOR's performance does not waive compliance with this Contract or establish a standard of performance other than that required by this Contract and by law.
- 13.7 **Binding Effect**. This Contract shall be binding upon and inure to the benefit of the parties hereto and their respective permitted assigns and successors.
- 13.8 **Appointment**. City hereby expressly reserves the right from time to time to designate by notice to DESIGN-BUILD CONTRACTOR one or more representatives to act partially or wholly for City in connection with the performance of City's obligations hereunder. DESIGN-BUILD CONTRACTOR shall act only upon instructions from such representatives unless otherwise specifically notified to the contrary.
- 13.9 **Notices**. All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Contract shall be in writing and in accordance with Paragraph 13.4 of the General Conditions.
- 13.10 **Dispute Resolution**. The dispute resolution procedures, which shall be applicable to all Phases of this Contract, are set forth in the General Conditions.

- 13.11 **Severability**. In case any provision hereof shall, for any reason, be held invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect any other provision hereof, and this Contract shall be construed as if such invalid or unenforceable provision had not been included herein.
- 13.12 Independent Contractor. DESIGN-BUILD CONTRACTOR recognizes that it is engaged as an independent contractor and acknowledges that City will have no responsibility to provide transportation, insurance, or other fringe benefits normally associated with employee status. DESIGN-BUILD CONTRACTOR, in accordance with its status as an independent contractor, covenants and agrees that it shall conduct itself consistent with such status, that it will neither hold itself out as nor claim to be an officer, partner, employee, or agent of City by reason hereof, and that it will not by reason hereof make any claim, demand or application to or for any right or privilege applicable to an officer, partner, employee or agent of City, including, but not limited to, unemployment insurance benefits, social security coverage, or retirement benefits. DESIGN-BUILD CONTRACTOR hereby agrees to make its own arrangements for any of such benefits as it may desire and agrees that it is responsible for all income taxes required by Applicable Law.
- 13.13 **DESIGN-BUILD CONTRACTOR'S DEBT.** IF DESIGN-BUILD CONTRACTOR, AT ANY TIME DURING THE TERM OF THIS CONTRACT, INCURS A DEBT, AS THE WORD IS DEFINED IN SECTION 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT DESIGN-BUILD CONTRACTOR HAS INCURRED A DEBT, IT SHALL IMMEDIATELY NOTIFY DESIGN-BUILD CONTRACTOR IN WRITING. IF DESIGN-BUILD CONTRACTOR DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO DESIGN-BUILD CONTRACTOR UNDER THIS CONTRACT, AND DESIGN-BUILD CONTRACTOR WAIVES ANY RECOURSE THEREFOR. DESIGN-BUILD CONTRACTOR SHALL FILE A NEW AFFIDAVIT OF OWNERSHIP, USING THE FORM DESIGNATED BY CITY, BETWEEN FEBRUARY 1 AND MARCH 1 OF EVERY YEAR DURING THE TERM OF THIS CONTRACT.

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#### **EXHIBIT "A"**

#### **DEFINED TERMS**

#### **ARTICLE 1. INTERPRETATION**

- 1.1 This Contract, including all Contract Documents, will be interpreted in accordance with the following:
  - 1.1.1 **General**. The interpretation and miscellaneous provisions of the General Conditions apply to all Contract Documents and Work. References to sections, paragraphs, articles or other provisions shall be deemed to mean those contained in this main body of the Contract unless specified otherwise.
  - 1.1.2 **Entire Contract**. This Contract, including all Contract Documents, contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Contract. Without limiting the generality of the foregoing, this Contract shall completely and fully supersede all other understandings and agreements among the parties with respect to such transactions, including those contained in the RFQ (if any), the submittal made by the DB in response thereto, the RFP, the proposal made by the DB in response thereto, and any amendments or supplements to any such documents.
  - 1.1.3 **Gender and Plurality**. Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words importing the singular number mean and include the plural number and vice versa.
  - 1.1.4 **Headings**. The table of contents and any headings preceding the text of the articles, sections and subsections of this Contract shall be solely for convenience of reference and shall not affect its meaning, construction or effect.
  - 1.1.5 **References to Hereto**. The terms "hereto," "hereby," "hereof," "herein," "hereunder" and any similar terms refer to this Contract.
  - 1.1.6 **References to Including**. The words "include," "includes" and "including" are to be construed as meaning "include without limitation," "includes without limitation" and "including without limitation," respectively.
  - 1.1.7 **References to Statutes**. Each reference to a statute or statutory provision includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision and includes any orders, regulations, by-laws, ordinances, codes of practice or instruments made under the relevant statute.
  - 1.1.8 **References to Governmental Authorities**. Each reference to the City or a Governmental Authority is deemed to include a reference to any successor to the City or such Governmental Authority or any organization or entity which has taken over the functions or responsibilities of the City or such Governmental Authority. Each reference to a private Person that is not an individual is deemed

to include a reference to its successors and permitted assigns.

- 1.1.9 **References to Documents and Standards**. Each reference to an agreement, document, standard, principle or other instrument includes a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned.
- 1.1.10 **Delivery of Documents in Digital Format**. In this Contract, the DB is obligated to deliver reports, records, designs, plans, drawings, specifications, proposals and other documentary submittals in connection with the performance of its duties hereunder. The DB agrees that all such documents shall be submitted to the City both in printed form (in the number of copies indicated) and, at the City's request, in digital form. Digital copies shall consist of computer readable data submitted in any standard interchange format which the City may reasonably request to facilitate the administration and enforcement of this Contract. In the event that a conflict exists between the signed or the signed and stamped hard copy of any document and the digital copy thereof, the signed or the signed and stamped hard copy shall govern.
- 1.1.11 **Severability**. If any provision of this Contract is held to be invalid, unenforceable or illegal to any extent, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Contract. If any such provision of this Contract is held to be invalid, unenforceable or illegal, the Parties will promptly endeavor in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Contract as nearly as possible to its original intent and effect.
- 1.1.12 **Drafting Responsibility**. The Parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Contract to the effect that ambiguous or conflicting terms or provisions should be construed against the Party who (or whose counsel) prepared the executed agreement or any earlier draft of the same.
- 1.1.13 **Counterparts**. This Contract may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Contract.
- 1.1.14 **Governing Law**. This Contract and all of the rights and obligations of the Parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas. Exclusive venue for litigation shall be located in Harris County, Texas.

#### **ARTICLE 2. DEFINITIONS**

- 2.1 As used in the in the Contract Documents, the following terms shall have the meanings set forth below:
  - 2.1.1 **Actual Cost**: A verifiable amount paid for labor, material, equipment and supplies in the performance of the Work.

- 2.1.2 **Addenda**: Any addenda to the Drawings or Specifications or other Contract Documents identified as Addenda, if any, in the Contract Documents.
- 2.1.3 Advanced Work Package: A portion of the Cost of Work prescribed in Exhibit A or that the DESIGN-BUILD CONTRACTOR proposes to the Director for construction work before the GMP has been finalized. A CGMP shall be agreed upon for each Advance Work Package.
- 2.1.4 **Affiliate**: With respect to any particular company or entity, a company or entity that: (a) owns and controls, directly or indirectly, such company or entity; (b) is owned and controlled, directly or indirectly, by such company or entity; (c) is owned and controlled, directly or indirectly, by the same company or entity that owns and controls such company or entity; (d) is a member of a joint venture with such company; or (e) either entity is the joint venture and the other company is a member of the joint venture.
- 2.1.5 **Agreed Cost of the Work**: The specific amount defined in **Section 8.1.2** that may not be exceeded by the Probable Cost of the Work without the express written consent of the Director.
- 2.1.6 **Air Operations Area (AOA)**: Any area of the airport intended to be used for the landing, takeoff or surface maneuvering of aircraft and support equipment and all of the area within the airport security fence.
- 2.1.7 **Airport Improvement Program (AIP)**: A funding source that provides grants to public agencies for planning and development of public use airports. Eligible projects include improvements related to enhancing safety, capacity, security and environmental concerns.
- 2.1.8 **Allowance**: "Allowance" means "Cash Allowance" as defined herein.
- 2.1.9 **Applicable Law**: All laws, treaties, ordinances, judgments, decrees, injunctions, writs, orders, codes, rules, regulations, permits, and interpretations of any Governmental Authority having jurisdiction over the Parties, the Project, the Work, the Contract Documents, and each other document delivered hereunder or in connection herewith.
- 2.1.10 **Basic Services**: All disciplines identified within the Contract Documents and all related usual and customary design, consultant, and other services necessary and reasonably inferable to complete the Project, or any phase of the Project, in accordance with the City's requirements and the terms of the Contract.
- 2.1.11 **Beneficial Occupancy**: When the City takes possession of and operates the Work (or portions of the Work) for its intended purposes.
- 2.1.12 **BIM**: Building Information Modeling. The digital or electronic representation of the project model and includes the process to create the model.
- 2.1.13 **Bonds**: Performance Bond, Payment Bond, Maintenance Bond, Bid Bond, Proposal Bond and other Surety instruments executed by Surety. When in

- singular form, refers to individual instrument.
- 2.1.14 **Bridging Documents**: The documents included in the Design Criteria Package as defined in Texas Government Code Section 2269.358.
- 2.1.15 **Business Enterprise**: Any business entity registered in a program authorized by 49 C.F.R. § 26 (where applicable) or City Code of Ordinances, Chapter 15, Article II, relating to Equal Opportunity Employment and taking affirmative action to ensure that applicants are employed and employees are treated without regard to race, religion, color, sex, national origin, or age. The term "Business Enterprise" may include any Disadvantaged Business Enterprise ("DBE"), Minority Business Enterprise ("MBE"), Woman Business Enterprise ("WBE"), Small Business Enterprise ("SBE"), Person with Disability Enterprise ("PDBE"), and any Historically Underutilized Business ("HUB").
- 2.1.16 **Business Enterprise Policy**: Contract documents and applicable policies relating to Business Enterprises and authorized under 49 C.F.R. § 26 or City Code of Ordinances, Chapter 15, Article V.
- 2.1.17 Calendar Day: Shall mean Day.
- 2.1.18 Capital Improvement Program (CIP): HAS's Capital Improvement Program.
- 2.1.19 Cash Allowance: An estimated sum of money to be used only for a limited class of expenditures such as utility relocation costs, fees for special licenses or permits, or other "pass-through" costs that would be the same for any contractor. Cash Allowances may not be used to purchase goods or services that are not specified in the Contract. The unspecified items must be purchased according to the terms of the General Conditions. A Cash Allowance may be referred to in the Contract Documents as an "Allowance".
- 2.1.20 **CBP**: U.S. Customs and Border Protection.
- 2.1.21 **CGMP Amendment**: CGMP Submittal accepted and approved by the Director.
- 2.1.22 **CGMP Submittal:** The proposal for the CGMP Amendment submitted by DB to the Director.
- 2.1.23 **Change Order**: Written instrument prepared by the City and signed by Director or his designee with notice to the City's Chief Procurement Office, and signed by DB, specifying the following: (1) a change in the Work or Preconstruction Phase Services, if any; (2) a change in Contract Price, if any; and (3) a change in Contract Time, if any. The value of a Change Order is the net amount after offsetting all deductions against all additions effected by the Change Order.
- 2.1.24 **City**: The City of Houston, a home rule municipality located principally within Harris County, Texas, including its successors and its authorized representatives.
- 2.1.25 **Claim**: Written demand or written assertion by one Party seeking adjustment of the Contract, payment of money, extension of time, or other relief under the

Contract and includes, but is not limited to, claims for materials, labor, equipment, delay, changes, adjustments, substitutions, fees and third party claims. The Party making the Claim has the responsibility to substantiate the Claim.

- 2.1.26 **Co-Location**: A system under which the DB's Key Personnel are located "under one roof" along with the Program Management Team in a location near the site.
- 2.1.27 **Commissioning**: A quality-focused process for enhancing delivery of a project. The process focuses upon verifying and documenting that the facility and all its systems and assemblies are planned, designed, installed, tested, operated, and maintained to meet HAS's requirements.
- 2.1.28 **Commissioning Authority (CxA)**: A third party firm contracted with the City to oversee the DB's commissioning plan.
- 2.1.29 **Component Guaranteed Maximum Price (CGMP)**: A guaranteed maximum price for construction of a defined incremental element of Work.
- 2.1.30 **Commissioning Plan (CxP)**: Developed by the Commissioning Authority with the assistance of the Program Management Team per the requirements of the Contact Documents and Scope of Work. The CxP provides structure, checklists, testing forms, schedules for all systems and equipment being installed.
- 2.1.31 Contingency: The dollar amount set out in the Guaranteed Maximum Price Proposal that is available for unanticipated impacts that are not otherwise the basis of a Change Order, and which may only be used upon prior written approval by the Director at his sole discretion for (i) any increased costs required for schedule recovery, if any; (ii) any increase in the costs of materials and equipment set forth in approved GMP; and (iii) any other costs that Director in his sole discretion deems appropriate to be covered by contingency. All unused contingency shall revert to the City at final completion of the Construction Phase. The Contingency shall not be used for costs incurred as a result of: (1) any failure to perform or insolvency; (2) fines or penalties imposed by any governmental body for negligent acts; (3) any failure to coordinate work with that of the City or its contractors after agreeing to a schedule; (4) any acts of negligence not attributable to the City or its separate contractors; and (5) any costs related to defective, rejected, or nonconforming Work, materials, or equipment.
- 2.1.32 **Construction Documents (CD)**: All of the graphic and written information prepared or assembled by Designer for communicating the design and for the bidding and construction of the Project.
- 2.1.33 **Construction Phase**: The phase of the Project during which the DB implements and executes the construction Work required by the Contract Documents.
- 2.1.34 **Construction Services:** The services more fully described as Construction Services in **Exhibit "B"**.
- 2.1.35 **Contract**: This agreement between the Parties including all exhibits, any written

- amendments authorized by City Council and DB, any CGMP Amendments, a GMP Amendment, and any Change Orders authorized by this Contract.
- 2.1.36 **Contract Documents**: The executed Contract and all Exhibits, any GMP Amendment, any Notice to Proceed, Change Order, or other Modification or Amendment, and Construction Drawings and Specifications.
- 2.1.37 **Contract Price**: The aggregate of the Preconstruction Fee, CGMP(s) or GMP, as applicable.
- 2.1.38 **Contract Standards**: The standards, terms, conditions, methods, techniques and practices imposed or required by: (1) Applicable Law; (2) good engineering and construction practice; (3) the baseline design documents, if any; (4) the insurance requirements; (5) good operating practice, (6) applicable equipment manufacturers' and suppliers' requirements and recommendations; and (7) any other standard, term, condition or requirement specifically provided in the Contract Documents to be observed by the DB.
- 2.1.39 **Contract Time**: The number of days stated in the Contract to complete the Work, plus days authorized by Change Order.
- 2.1.40 **Contractor**: A construction contractor or construction manager other than the DB hired by the City that may work on the Project or in connection with the Project, except as set out in the Division 01 Specifications.
- 2.1.41 Correction Period: The period during which the DB shall be obligated to replace or correct deficiencies in Products and/or the Work, which period shall be one year following Substantial Completion and acceptance of the Project, or discrete phase thereof, unless the applicable manufacturer or subcontractor, if any, provides a longer correction period, in which event the longer correction period shall apply.
- 2.1.42 **Cost of the Work**: Cost of the Work has the meaning set forth in **Section 8.4** of the Contract.
- 2.1.43 **Date of Commencement of the Work**: Date established in Notice to Proceed on which Contract Time will commence. This date will not be changed by failure of DB, or persons or entities for whom DB is responsible, to act.
- 2.1.44 **Date of Substantial Completion**: Date that construction, or portion thereof designated by the Director, is certified by Director to be substantially complete.
- 2.1.45 **Day**: Whether capitalized or not, unless otherwise specifically provided, means calendar day, including weekends and legal holidays. In the case of plural "days", those days will be consecutive.
- 2.1.46 **DB**: Shall mean DESIGN-BUILD CONTRACTOR. The DB is the entity contracted by HAS to perform preconstruction and construction services for a project. Design-Build is the delivery method.
- 2.1.47 **DB-Related Entity**: The DB, its Subcontractors, Suppliers, subconsultants

- including professionals, technicians, engineers and anyone for whose acts any of the foregoing DB may be legally or contractually liable, including officers, directors, employees, representatives, agents, consultants and contractors.
- 2.1.48 **DB Fee:** The fee for the DB's profit and general overhead calculated as a percentage of Cost of the Work (except pass-through Allowances, insurance and Bonds) determined by the City at the time of acceptance of the GMP.
- 2.1.49 **Design to Budget**: The process by which the Designer designs the Project to ensure the Agreed Cost of the Work is not exceeded.
- 2.1.50 **Designer**: Entity responsible for the preparation of the Construction Documents in a DB delivery team.
- 2.1.51 **Director**: The Director of the Houston Airport System, or any person designated by the Director to perform one or more of the Director's duties under this Contract.
- 2.1.52 **Drawings**: Graphic and pictorial portions of the Contract that define the character and scope of the Work.
- 2.1.53 **Effective Date**: The date the City Controller countersigns the Signature Page of this Contract.
- 2.1.54 **EPM**: The Executive Program Manager hired by the City to lead and manage, in consultation with the Director, the ITRP to successful completion. Roles include Executive Program Manager, Manager of Projects, Program Controls Manager, Manager of Design, and Manager of Construction.
- 2.1.55 **FAA**: The Federal Aviation Administration.
- 2.1.56 **Final Completion**: The full completion of the Work in accordance with the Contract Documents, without limitation, the satisfaction of all outstanding and Punch List items, and the issuance of a Certificate of Occupancy by all permitting and licensing entities.
- 2.1.57 **Furnish**: To supply, pay for, deliver to the site, and unload.
- 2.1.58 General Conditions: The requirements, terms and conditions set forth in Exhibit "C" of the DB Contract, which may include terms and conditions that are substantially the same as those found in this Contract and therefore shall be read together and interpreted by City and DB to eliminate conflict between the two. However, should a conflict exist, after Director and DB have used best efforts to reconcile the conflict, the provision most favorable to the City shall prevail.
- 2.1.59 **General Conditions Work**: DB's on-site management, administrative personnel, insurance, Bonds, equipment, utilities, and incidental work, including field labor and materials. General Conditions includes, but is not limited to: all supervision and project management, including superintendent, assistant superintendent; permits; mobilization; de-mobilization; field engineers and helpers, professional surveyor; field office; field office furnishings; office supplies;

field office maintenance and repair; copiers and supplies; storage; communication devices (telephone, radio, etc.); project signs; construction fence – install/remove/maintain; access construction; general clean-up; finish areas clean-up; dumpsters; temporary water service; temporary electrical service; temporary lighting; temporary telephone; temporary weather protection; temporary fire protection; equipment start and testing; monthly ice and cups, monthly toilets; monthly water; and quality control.

- 2.1.60 **General Requirements**: The sections of Division 01 Specifications that specify administrative and procedural requirements and temporary facilities required for the Work.
- 2.1.61 **Governmental Authority**: Any federal, foreign, state, local or municipal governmental body; any governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal. Notwithstanding the foregoing, Governmental Authority shall not include the Director or his designees.
- 2.1.62 **Guaranteed Maximum Price (GMP)**: The amount agreed upon by City and DB as the maximum cost to City for the Work for the Construction Phase, including the Cost of the Work and the DB's Fee for the Construction Phase. The GMP shall incorporate all prior CGMPs as described in Section 4.8 of the Contract.
- 2.1.63 **GMP Amendment**: GMP Submittal accepted by the Director and approved by City Council.
- 2.1.64 **GMP Submittal:** The proposal for the GMP Amendment submitted by DB to the Director.
- 2.1.65 **HAS**: The Houston Airport System, a department of the City of Houston.
- 2.1.66 **IAH**: George Bush Intercontinental Airport/Houston.
- 2.1.67 **Inspector**: City's employee or agent authorized to assist with inspection of the Work.
- 2.1.68 **Install**: Unpack, assemble, erect, place, anchor, apply, work to dimension, finish, cure, clean, protect, and similar operations.
- 2.1.69 **ITRP**: The IAH Terminal Redevelopment Program.
- 2.1.70 ITRP Enabling Projects: Projects included in the HAS CIP designed to serve the newly constructed MLIT and FIS facilities as well as a new roadway system and airfield improvements. These projects include, among others, the MLIT Apron and Taxilanes, the Program Management Office Building, the ITRP Enabling Utilities-Landside, and the East Aircraft Parking Hardstand.
- 2.1.71 **Key Personnel**: Those people having authority and responsibility for planning, directing and controlling the activities of the DB, either directly or indirectly.

- 2.1.72 Labor Burden: Indirect costs associated with employees' compensation. Typical costs associated with the burden include payroll taxes, worker's compensation and health insurance, paid time off, training and travel expenses, vacation and sick leave, pension contributions and other benefits. Labor Burden includes actual costs paid or incurred by the DB for labor costs arising out of taxes, insurance, and benefits that are required either (1) by law or (2) by collective bargaining agreements. Labor Burden shall NOT include profit, general and administrative costs, short- or long-term disability, home and branch office overhead, profit sharing, bonuses, employee stock ownership plans, vehicle allowances, cell phones, computer charges and other costs not directly related to employee costs.
- 2.1.73 **Legal Holiday**: Day established by the City Council as a holiday.
- 2.1.74 **Mayor's Office of Business Opportunity**: Any reference to, or use of, the "Office of Affirmative Action" shall mean the City's Office of Business Opportunity, or any such future name to which it is changed.
- 2.1.75 **Milestone**: An event activity that has zero day duration and is typically used to represent the beginning or end of a certain stage of the Project.
- 2.1.76 **Minor Change in the Work**: A written change in the Work ordered by Director that does not change Contract Price or Contract Time, and that is consistent with the general scope of the Contract.
- 2.1.77 **MLIT**: The Mickey Leland International Terminal, or Terminal D at IAH.
- 2.1.78 **Modification**: Change Order, Work Change Directive, or Minor Change in the Work.
- 2.1.79 **Notice of Noncompliance**: A written notice by Director to DB regarding defective or nonconforming work that does not meet the Contract requirements and that establishes a time by which DB shall correct the defective or nonconforming work.
- 2.1.80 **Notice to Proceed**: A written notice by the Director to DB establishing (a) Date of Commencement of the Work for a phase of Construction or (b) the date DB is to begin performing Preconstruction Services.
- 2.1.81 **OCIP**: Owner Controlled Insurance Program.
- 2.1.82 **ORAT**: Operational Readiness, Activation and Transition.
- 2.1.83 **Original Contract Price**: The monetary amount originally stated in the Contract.
- 2.1.84 **Overhead**: Indirect or fixed expenses of operating a business, including both home office locations and offsite and jobsite locations.
- 2.1.85 **Owner**: The City of Houston, Texas.
- 2.1.86 **Parties**: DB and the City. When in singular form, refers to either the City or DB (as Page 48 Exhibit A

- appropriate).
- 2.1.87 **PDM**: Program Definition Manual for the Mickey Leland International Terminal Final Version December 2014.
- 2.1.88 **Phase**: Either the Project's Preconstruction Phase or the Project's Construction Phase, as those terms are defined in the Contract Documents.
- 2.1.89 **PMSS**: Program Management Support Services consisting of staff contracted by the City to provide systems, services and staff as an integrated team to manage and execute the ITRP in support of the EPM.
- 2.1.90 **Pollutant Facility**: Any facility regulated by the State of Texas to protect the health and environment from contamination by Pollutants, including without limitation, landfills, oil and gas production and storage facilities, wastewater facilities, waste injection wells, and storage tanks (including drums).
- 2.1.91 **Pollutant**: Any materials subject to the Texas Solid Waste Disposal Act.
- 2.1.92 **Preconstruction Phase**: The phase of the Project during which the DB implements and executes the preconstruction Work required by the Contract Documents. The Preconstruction Phase may be referred to in this Contract as "Phase 1 Preconstruction".
- 2.1.93 **Preconstruction Services**: The services more fully described as Preconstruction Services in **Exhibit "B"** and **"E"**.
- 2.1.94 **Price Proposal**: The completed RFP Cost Proposal Form submitted by DB.
- 2.1.95 **Probable Cost of the Work**: An estimate of the Cost of the Work as reconciled by the DB and the Director.
- 2.1.96 **Product**: Materials, equipment, or systems permanently incorporated into the Work (or to be incorporated into the Work) and temporarily used in performance of the Work. Products may include existing construction or components intended for reuse.
- 2.1.97 **Product Data**: Illustrations, standard schedules, performance charts, instructions, brochures, diagrams, and other information furnished by DB to illustrate a Product.
- 2.1.98 **Program**: IAH Terminal Redevelopment Program (ITRP). The Project is part of the Program.
- 2.1.99 **Program Manager Team** or **PMT**: HAS, EPM and PMSS professionals or firms employing professionals, engaged by City to be the Director's authorized representative for administration of the Work. Titles used within City's departments may be different from those used in this definition.
- 2.1.100 **Project**: Total construction, of which the Work performed under the Contract Documents may be the whole or a part, and which may include construction by

- the City or by separate contractors as more fully described in the Contract.
- 2.1.101 **Project Manual**: The specifications for the Work. Certain provisions of the Project Manual may be revised during Preconstruction Services. If any revisions to the Project Manual are inconsistent with the material terms of this Contract, this Contract shall control.
- 2.1.102 **Project Schedule**: The DB's full scope of Works and Services, time phased and logic linked, in a schedule that represents how the DB intends to reach Final Completion within the Contract Time.
- 2.1.103 **Project Team**: The City (acting through the Director and other City employees and representatives working in connection with the Project), EPM, PMSS, DB, any separate contractors employed by the City, and other consultants employed for the purpose of programming, design, and construction of the Project. The constitution of the Project Team may vary at different times during the Preconstruction Services and Construction Phase of the Project. The Project Team, excluding those designated by the DB, will be designated by the Director and may be modified from time to time by him, without additional time or compensation being awarded to DB.
- 2.1.104 **Proposal Documents**: Documents submitted by DB that may or may not have Price Proposal as part of the submittal.
- 2.1.105 **Provide**: Furnish and Install, complete, ready for intended use.
- 2.1.106 **Punch List**: Uncompleted work items that the DB, or Subcontractor must complete in order to achieve Final Completion.
- 2.1.107 **Quality Control (QC)**: Those standards, systems, processes, procedures and activities exercised by the DB, subcontractors and suppliers to ensure that the Work is constructed in accordance with the Contract Documents.
- 2.1.108 Safety Impact Position: DB's employment position involving duties that if performed with inattentiveness, errors in judgment, or diminished coordination, dexterity, or composure may result in mistakes that could present a real and/or imminent threat to the personal health or safety of the employee, co-workers, and/or the public.
- 2.1.109 **Samples**: Physical examples that illustrate Products, or workmanship, and establish standards by which the Work is judged.
- 2.1.110 Schedule of Values: The detailed, itemized list of prices and costs that establishes the value of each part or component of the Work, developed by DB in accordance with the Contract Standards and accepted by Director to serve as the basis for progress payments for the Work.
- 2.1.111 **Shop Drawings**: Drawings, diagrams, schedules, and other data specially prepared for the Work by DB, Subcontractor or Supplier, to illustrate a portion of the Work.

- 2.1.112 **SIDA**: Security Identification Display Area. The SIDA is the secure area in which an identification badge must be visible and displayed.
- 2.1.113 **Special Conditions**: Any additional provisions identified as Special Conditions, if any, in the Contract Documents.
- 2.1.114 **Specifications**: Divisions 01 through 48 of the documents (as defined in the CSI MasterFormat<sup>TM</sup>) that are incorporated into the Contract, consisting of written General Requirements and requirements for Products, standards, and workmanship for the Work, and performance of related services.
- 2.1.115 **Statement of Qualification:** Document submitted by the DB in response to a Request for Qualifications, to demonstrate its ability to perform the requested services.
- 2.1.116 **Subcontractor**: Person or firm that has direct or indirect contract with DB or with a Subcontractor to perform a portion of the Work and its authorized representatives.
- 2.1.117 **Substantial Completion**: The stage in the progress of the Work or designated portion thereof where the Work is sufficiently and suitably complete in accordance with the Contract Documents (i) so that the City, at its sole discretion, can take Beneficial Occupancy, and (ii) the balance of the Work, including all Punch List work can reasonably be expected to be completed within 30 Calendar Days.
- 2.1.118 **Superintendent**: Employee of DB having authority and responsibility to act for and represent DB.
- 2.1.119 **Supplier**: Manufacturer, distributor, materialman, or vendor having a direct agreement with DB or Subcontractor for Products, or services and its authorized representatives.
- 2.1.120 **Surety**: Corporate entity that is bound by one or more Bonds. Surety shall include co-surety or reinsurer, as applicable.
- 2.1.121 **TSA**: Transportation Security Administration.
- 2.1.122 **UMP**: The IAH Utilities Master Plan.
- 2.1.123 **Underground Facilities**: Pipes, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments and encasements containing such facilities that exist below ground level.
- 2.1.124 **Unit Price**: An amount stated in the Contract for an individual, measurable item of work, which, when multiplied by actual quantity incorporated into the Work, amounts to full compensation for completion of the item, including work incidental to it.
- 2.1.125 **Work**: All services, supervision, labor, materials, supplies, equipment, Products and other items for the Construction Phase required to perform this Contract

**Defined Terms** 

(whether contemplated or partially contemplated) in strict accordance with the Contract Documents (as such may be modified or amended), including all things reasonably inferable from the Contract Documents and all of the foregoing provided or to be provided by DB to fulfill DB's obligations under the Contract Documents. The Work may constitute the whole or a portion of the Project.

2.1.126 **Work Change Directive**: A written change in the Work, ordered by Director, that is within the general scope of the Contract and consisting of additions, deletions, or other revisions. A Work Change Directive will state proposed basis for adjustment, if any, in Contract Price or Contract Time, or both.

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# EXHIBIT "B" ITRP ENABLING UTILITIES – LANDSIDE DESIGN-BUILD SCOPE OF SERVICES

#### **EXHIBIT "C"**

#### Document 00700

# **GENERAL CONDITIONS (DESIGN BUILD)**

#### ITRP EDITION

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#### **ARTICLE 1 - GENERAL PROVISIONS**

#### 1.1 **DEFINITIONS**

1.1.1 Capitalized terms have the meanings set forth in **Exhibit "A"**.

#### 1.2 EXECUTION, CORRELATION, AND INTENT

- 1.2.1 Execution of the Contract by DESIGN-BUILD CONTRACTOR is conclusive that DESIGN-BUILD CONTRACTOR has visited the Work site, become familiar with local conditions under which the Work will be performed, and fully informed itself as to conditions and matters which can affect the Work or costs. DESIGN-BUILD CONTRACTOR further agrees that it has carefully correlated personal observations with requirements of the Contract.
- 1.2.2. The Contract Documents and Modifications have been read and carefully considered by DESIGN-BUILD CONTRACTOR who understands and agrees to their sufficiency for the Work. The Contract may not be more strongly construed against the City than against DESIGN-BUILD CONTRACTOR and Surety.
- 1.2.3 DESIGN-BUILD CONTRACTOR shall include all items necessary for proper execution and completion of the Work in strict accordance with the Contract Documents and reasonably inferable therefrom.
- 1.2.4 Reference to standard specifications, manuals, or codes of a technical society, organization, or association, or to laws or regulations of a governmental authority, whether specific or implied, mean the latest edition in effect as of date of written agreement as to a CGMP or the GMP, except as may be otherwise specifically stated in the Contract Documents.
- 1.2.5 No provision of any referenced standard, specification, or manual changes the duties and responsibilities of the City, Director, DESIGN-BUILD CONTRACTOR, or Designer from those set forth in the Contract.
- 1.2.6 Organization of Specifications into divisions, sections, and articles and arrangement of Drawings does not control DESIGN-BUILD CONTRACTOR in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.
- 1.2.7 Unless otherwise defined in the Contract, words which have well-known construction industry technical meanings are used in the Contract in accordance with these recognized meanings.
- 1.2.8 Where the words "directed," "required," "permitted," "ordered," "designated," "prescribed," or words of like import are used, it shall mean the direction, requirement, permission, order, designation, or prescription of Director unless explicitly stated otherwise. The words "approved," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to Director, unless explicitly stated otherwise.
- 1.2.9 Reference to a specific requirement of a cited standard shall include all general requirements of the entire cited standard pertinent to the specific reference.

#### 1.3 OWNERSHIP AND USE OF DOCUMENTS

- 1.3.1 Drawings, Specifications, and other documents prepared by the City or by DESIGN BUILD CONTRACTOR are instruments of service through which the Work to be executed by DESIGN-BUILD CONTRACTOR is described. DESIGN-BUILD CONTRACTOR may retain one Contract record set.
- 1.3.2 Neither DESIGN-BUILD CONTRACTOR, Subcontractor, nor Supplier will own or claim a copyright to documents contained in the Contract or any part of the Contract.
- 1.3.3 Documents contained in the Contract Documents, prepared by the City or by DESIGN-BUILD CONTRACTOR, and copies furnished to DESIGN-BUILD CONTRACTOR, are for use solely with respect to the Work. They may not be used by DESIGN-BUILD CONTRACTOR, Subcontractors, or Suppliers on other projects or for additions to the Work, outside the scope of the Work, without the specific written consent of Director.
- 1.3.4 DESIGN-BUILD CONTRACTOR, Subcontractors, and Suppliers are granted a limited license to use and reproduce applicable portions of the Contract appropriate to and for use in execution of their Work under the Contract.
- 1.3.5 Any documents created by DESIGN-BUILD CONTRACTOR or its subcontractors for the Work shall become the property of the City upon their creation. In the event this transfer of ownership is ineffective for any reason, the City is hereby granted an irrevocable, non-exclusive, perpetual, royalty-free license to use said documents in conjunction with the Project. This provision shall be in all contracts awarded by DESIGN-BUILD CONTRACTOR and DESIGN-BUILD CONTRACTOR shall require the provision in all contracts of lower tiers.

#### 1.4 <u>INTERPRETATION</u>

- 1.4.1 Specifications are written in an imperative streamlined form and are directed to DESIGN-BUILD CONTRACTOR, unless noted otherwise. When written in this form, words "shall be" are included by inference where a colon (:) is used within sentences or phrases.
- 1.4.2 In the interest of brevity, the Contract frequently omits modifying words such as "all" and "any" and articles such as "the" and "an", but an absent modifier or article is not intended to affect interpretation of a statement.

#### **ARTICLE 2 - THE CITY**

#### 2.1 LIMITATIONS OF THE CITY'S OFFICERS AND EMPLOYEES

2.1.1 No officer or employee of the City may authorize DESIGN-BUILD CONTRACTOR to perform an act or work contrary to the Contract Documents, except as otherwise provided in the Contract.

#### 2.2 **DUTIES OF THE CITY**

- 2.2.1 If a building permit is required, the City will process an application for, and DESIGN-BUILD CONTRACTOR shall purchase the building permit before Date of Commencement of the Work or applicable portion of the Work.
- 2.2.3 When necessary for performance of the Work, the City will provide surveys describing physical characteristics, legal limitations, legal description of site, and horizontal and vertical control adequate to lay out the Work.

- 2.2.4 Information or services that the City is required to provide under the Contract will be provided by the City with reasonable promptness to avoid delay in orderly progress of the Work.
- 2.2.5 The Contract imposes no implied duty on the City. The City does not warrant any plans or specifications associated with the Contract. This paragraph does not expand the obligations of the DESIGN-BUILD CONTRACTOR under Article 3.3 of the Contract.
- 2.2.6 Except as expressly stated in this Contract and the Document 00700-General Conditions, the City owes no duty to the DESIGN-BUILD CONTRACTOR or any Subcontractor or Supplier.

#### 2.3 AVAILABILITY OF LAND AND USE OF SITE

- 2.3.1 The City will furnish, as indicated in the Contract, rights-of-way, land on which the Work is to be performed, and other land designated in the Contract Documents for use by DESIGN-BUILD CONTRACTOR unless otherwise provided in the Contract.
- 2.3.2 DESIGN-BUILD CONTRACTOR shall confine operations at site to those areas permitted by law, ordinances, permits, and the Contract Documents.
- 2.3.3 In addition to land provided by the City under Paragraph 2.3.1, DESIGN-BUILD CONTRACTOR shall provide all land and access to land that may be required for use by DESIGN-BUILD CONTRACTOR for temporary construction facilities or for storage of materials and equipment, and shall indemnify the City during its use of the land as stated in Paragraph 3.25.

#### 2.4 THE CITY'S RIGHT TO STOP THE WORK

2.4.1 If DESIGN-BUILD CONTRACTOR fails to carry out the Work in accordance with the Contract, or fails to correct work which is not in accordance with requirements of the Contract as required in Paragraphs 12.1 and 12.2, the City may, by Notice of Noncompliance, order DESIGN-BUILD CONTRACTOR to stop the Work or any portion of the Work until the cause for the order has been eliminated. However, the right of the City to stop the Work will not give rise to a Claim for delay or an increase in compensation or to a duty on the part of the City to exercise this right for the benefit of DESIGN-BUILD CONTRACTOR or any other person or entity, except to the extent required by Paragraph 6.2. If DESIGN-BUILD CONTRACTOR corrects the defective or nonconforming work within the time established in Notice of Noncompliance, Director will give written notice to DESIGN-BUILD CONTRACTOR to resume performance of the Work.

#### 2.5 THE CITY'S RIGHT TO CARRY OUT WORK

- 2.5.1 If DESIGN-BUILD CONTRACTOR fails to carry out work in accordance with the Contract, and fails within the period established in a Notice of Noncompliance to correct the nonconforming work, the City may, after expiration of the required period, correct the deficiencies without prejudice to other remedies the City may have, including rights of the City under Paragraph 14.1.
  - 2.5.1.1 When the City corrects deficiencies, Director will issue an appropriate Change Order and deduct from payments then or thereafter due DESIGN-BUILD CONTRACTOR the cost of correcting the deficiencies, including compensation for Designer's additional services and expenses made necessary by such default, neglect, or failure. This action by the City and amounts charged to DESIGN-BUILD CONTRACTOR are both subject to prior approval of Director. If payments,

then or thereafter due DESIGN-BUILD CONTRACTOR are not sufficient to cover these amounts, DESIGN-BUILD CONTRACTOR shall pay the difference to the City. Costs of correcting deficiencies which would have otherwise been reimbursable to DESIGN-BUILD CONTRACTOR, as determined by the Director in his sole discretion, shall not be deducted from sums otherwise due DESIGN-BUILD CONTRACTOR, but shall be considered a Cost of the Work, as determined by the Director, in his sole discretion, in determining a CGMP or the GMP and any savings shall revert to the City.

2.5.2 Notwithstanding the City's right to carry out work, maintenance and protection of the Work (but excluding such work as carried out by the City) remains DESIGN-BUILD CONTRACTOR's responsibility, as provided in the Contract.

#### 2.6 THE CITY'S RIGHT TO REJECT WORK

2.6.1 The Director shall have the right to reject Work that does not conform to the Contract Documents. City shall also have the right to require special inspection or testing of the Work, whether or not such Work is then fabricated, installed, or completed. Neither City's right to act under this Paragraph nor any decision by City either to exercise or not to exercise such right shall give rise to any duty or responsibility of City to DESIGN-BUILD CONTRACTOR or to any other person or entity, or result in a waiver of any of City's rights or relieve DESIGN-BUILD CONTRACTOR of its obligations.

#### **ARTICLE 3 - DESIGN-BUILD CONTRACTOR**

# 3.1 <u>RESPONSIBILITIES</u>

- 3.1.1 DESIGN-BUILD CONTRACTOR shall maintain an office with an agent in the greater City of Houston area during the DESIGN-BUILD CONTRACTOR's performance under the Contract. DESIGN-BUILD CONTRACTOR shall file its street address with Director. DESIGN-BUILD CONTRACTOR may use the job site office of DESIGN-BUILD CONTRACTOR to meet this requirement.
- 3.1.2 DESIGN-BUILD CONTRACTOR and DESIGN-BUILD CONTRACTOR's employees shall not give or lend money or anything of value to an officer or employee of the City. Should this Paragraph 3.1.2 be violated, Director may terminate the Contract under Paragraph 14.1.

#### 3.2 <u>REVIEW OF CONTRACT AND FIELD CONDITIONS BY DESIGN-BUILD CONTRACTOR</u>

- 3.2.1 DESIGN-BUILD CONTRACTOR shall carefully study and compare documents contained in the Contract with each other and with information furnished by the City pursuant to Paragraph 2.2 and consistent with the DESIGN-BUILD CONTRACTOR's obligations in Article 3.3 of the Contract, shall immediately report, in writing, any errors, inconsistencies, or omissions to Director. If Work is affected, DESIGN-BUILD CONTRACTOR shall obtain a written interpretation or clarification from Director before proceeding with the affected Work.
- 3.2.2 DESIGN-BUILD CONTRACTOR shall take field measurements and verify field conditions, and shall carefully compare the conditions and other information known to DESIGN-BUILD CONTRACTOR with the Contract, before commencing activities. DESIGN-BUILD CONTRACTOR shall immediately report, in writing, to Director for interpretation or clarification of discrepancies, inconsistencies, or omissions discovered during this process.

# 3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

- 3.3.1 DESIGN-BUILD CONTRACTOR shall supervise, direct, and inspect the Work competently and efficiently, devoting the attention and applying the skills and expertise as necessary to perform the Work in accordance with the Contract Documents. DESIGN-BUILD CONTRACTOR is solely responsible for and has control over construction means, methods, techniques, sequences, and procedures of construction; for safety precautions and programs in connection with the Work; and for coordinating all Work under the Contract.
- 3.3.2 Regardless of observations or inspections by the City or City's consultants, DESIGN-BUILD CONTRACTOR shall perform and complete the Work in accordance with the Contract and submittals approved pursuant to Paragraph 3.18. The City is not liable or responsible to DESIGN-BUILD CONTRACTOR or Surety for Work performed by DESIGN-BUILD CONTRACTOR that is not in accordance with the Contract regardless of whether such nonconformities are discovered during construction or after acceptance of the Work.

# 3.4 **SUPERINTENDENT**

- 3.4.1 DESIGN-BUILD CONTRACTOR shall employ a competent Superintendent and necessary assistants who shall be present at the Project site during performance of the Work. Communications given to Superintendent are binding on the DESIGN-BUILD CONTRACTOR.
- 3.4.2 DESIGN-BUILD CONTRACTOR shall notify Director in writing of its intent to replace the Superintendent. DESIGN-BUILD CONTRACTOR shall not replace the Superintendent if Director makes a reasonable objection in writing.

#### 3.5 LABOR

- 3.5.1 DESIGN-BUILD CONTRACTOR shall provide competent, qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. The City may, by written notice, require DESIGN-BUILD CONTRACTOR to remove from the Work any employee of DESIGN-BUILD CONTRACTOR or Subcontractors to whom Director makes reasonable objection.
- 3.5.2 DESIGN-BUILD CONTRACTOR shall comply with the applicable Business Enterprise Policy set out in this Contract and as set out in Chapter 15, Article V of the City of Houston Code of Ordinances.
- 3.5.3 When the GMP is greater than \$1,000,000, DESIGN-BUILD CONTRACTOR shall make Good Faith Efforts to award subcontracts or supply agreements in at least the percentages set out in Article 10 of the Contract. DESIGN-BUILD CONTRACTOR acknowledges that it has reviewed the requirements for Good Faith Efforts on file with the City's Office of Business Opportunity and shall comply with them.
  - 3.5.3.1 DESIGN-BUILD CONTRACTOR shall require written subcontracts with Business Enterprises and shall submit all disputes with Business Enterprises to voluntary mediation. Business Enterprise subcontracts complying with City Code of Ordinances Chapter 15, Article V must contain the terms set out in Subparagraph 3.5.3.2. If DESIGN-BUILD CONTRACTOR is an individual person, as distinguished from a corporation, partnership, or other legal entity, and the amount of the subcontract is \$50,000 or less, the subcontract must also be signed by the attorneys of the respective parties.

- 3.5.3.2 DESIGN-BUILD CONTRACTOR shall ensure that subcontracts with Business Enterprise firms are clearly labeled "THIS CONTRACT MAY BE SUBJECT TO MEDIATION ACCORDING TO THE TEXAS ALTERNATIVE DISPUTE RESOLUTION ACT" and contain the following terms:
  - 3.5.3.2.1. (Business Enterprise) may not delegate or subcontract more than 50 percent (50%) of work under this subcontract to any other subcontractor without the express written consent of the City's OBO Director (the "OBO Director").
  - 3.5.3.2.2. (Business Enterprise) shall permit representatives of the City of Houston, at all reasonable times, to perform (1) audits of the books and records of the Subcontractors and Suppliers, and (2) inspections of all places where work is to be undertaken in connection with this subcontract. (Business Enterprise) shall keep the books and records available for this purpose for at least four years after the end of its performance under this subcontract. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations.
  - 3.5.3.2.3. Within five (5) business days of execution of this subcontract, DESIGN-BUILD CONTRACTOR and (Business Enterprise) shall designate in writing to the OBO Director an agent for receiving any notice required or permitted to be given pursuant to Chapter 15 of the Houston City Code of Ordinances, along with the street and mailing address and phone number of the agent.
- 3.5.4 The requirements and terms of the City of Houston Pay or Play Program, as set out in Executive Order 1-7, as revised from time to time, are incorporated into the Contract for all purposes. DESIGN-BUILD CONTRACTOR has reviewed Executive Order 1-7 and shall comply with its terms and conditions. IF DESIGN-BUILD CONTRACTOR DOES NOT PAY IN ACCORDANCE WITH THE PAY OR PLAY PROGRAM WITHIN THIRTY (30) DAYS OF THE DATE DIRECTOR SENDS DESIGN-BUILD CONTRACTOR WRITTEN NOTIFICATION, CITY CONTROLLER MAY DEDUCT FUNDS UP TO THE AMOUNT OWED FROM ANY PAYMENTS OWED TO DESIGN-BUILD CONTRACTOR UNDER THIS CONTRACT, AND DESIGN-BUILD CONTRACTOR WAIVES ANY RECOURSE.

#### 3.6 PREVAILING WAGE RATES

- 3.6.1 DESIGN-BUILD CONTRACTOR shall comply with governing statutes providing for labor classification of wage scales for each craft or type of laborer, worker, or mechanic.
- 3.6.2 Prevailing wage rates applicable to the Work may be one or a combination of the following wage rates identified in **Exhibit "H"** of the Contract:
  - 3.6.2.1. Federal Wage Rate General Decisions
    - 3.6.2.1.1. Highway Rates
    - 3.6.2.1.2. Building Rates
    - 3.6.2.1.3. Heavy Construction Rates
    - 3.6.2.1.4. Residential Rates
  - 3.6.2.2. City Prevailing Wage Rates
    - 3.6.2.2.1. Building Construction Rates
    - 3.6.2.2.2. Engineering Construction Rates

#### 3.6.2.2.3. Asbestos Worker Rates

3.6.3 Each week DESIGN-BUILD CONTRACTOR shall submit to the City's Office of Business Opportunity certified copies of payrolls showing classifications and wages paid by DESIGN-BUILD CONTRACTOR, Subcontractors, and Suppliers for each employee under the Contract, for any day included in the Contract.

#### 3.7 LABOR CONDITIONS

- 3.7.1 In the event of labor disputes affecting DESIGN-BUILD CONTRACTOR or DESIGN-BUILD CONTRACTOR's employees, DESIGN-BUILD CONTRACTOR shall utilize all possible means to resolve disputes in order that the Work not be delayed to any extent. These means include seeking injunctive relief and filing unfair labor practice charges, and any other action available to DESIGN-BUILD CONTRACTOR.
- 3.7.2 When DESIGN-BUILD CONTRACTOR has knowledge that any actual or potential labor dispute is delaying or is threatening to delay timely performance of the Work, DESIGN-BUILD CONTRACTOR shall immediately notify Director in writing. No Claims will be accepted by Director for costs incurred as a result of jurisdictional or labor disputes.

#### 3.8 DRUG DETECTION AND DETERRENCE

- 3.8.1 It is the policy of the City to achieve a drug-free work force and to provide a workplace that is free from the use of illegal drugs and alcohol. It is also the policy of the City that manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol by contractors while on the City's premises is prohibited. By executing the Contract, DESIGN-BUILD CONTRACTOR represents and certifies that it meets and will comply with all requirements and procedures set forth in the Mayor's Policy on Drug Detection and Deterrence, City Council Motion No. 92-1971 ("Mayor's Policy") and the Mayor's Drug Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31, (Revised) ("Executive Order"). Copies of the Mayor's Policy and Executive Order are on file in the office of the City Secretary.
  - 3.8.1.1 The Executive Order applies to the City's contracts for labor or services except the following:
    - 3.8.1.1.1. contracts authorized by Emergency Purchase Orders,
    - 3.8.1.1.2. contracts in which imposition of requirements of the Executive Order would exclude all potential bidders or proposers, or would eliminate meaningful competition for the Contract,
    - 3.8.1.1.3. contracts with companies that have fewer than fifteen (15) employees during any 20-week period during a calendar year and no safety impact positions,
    - 3.8.1.1.4. contracts with non-profit organizations providing services at no cost or reduced cost to the public, and
    - 3.8.1.1.5. contracts with federal, state, or local governmental entities.
  - 3.8.1.2 Prior to execution of the Contract, DESIGN-BUILD CONTRACTOR shall have filed with the City:

- 3.8.1.2.1. a Drug Policy Compliance Agreement form (Attachment "A" to the Executive Order),
- 3.8.1.2.2. a copy of DESIGN-BUILD CONTRACTOR's drug free workplace policy, and
- 3.8.1.2.3. a written designation of all safety impact positions, if applicable, or a DESIGN-BUILD CONTRACTOR's Certification of a No Safety Impact Positions form (Attachment "C" to the Executive Order).
- 3.8.1.3 Every six (6) months during performance of the Contract and upon completion of the Contract, DESIGN-BUILD CONTRACTOR shall file a Drug Policy Compliance Declaration form (Attachment "B" to the Executive Order). The DESIGN-BUILD CONTRACTOR shall submit the Drug Policy Compliance Declaration within thirty (30) days of expiration of each six-month period of performance and within thirty (30) days of Final Completion. The first six-month period shall begin on Date of Commencement of the Work.
- 3.8.1.4 DESIGN-BUILD CONTRACTOR shall have a continuing obligation to file updated designation of safety impact positions when additional safety impact positions are added to DESIGN-BUILD CONTRACTOR's employee workforce during performance of the Work.
- 3.8.1.5 DESIGN-BUILD CONTRACTOR shall require its Subcontractors and Suppliers to comply with the Mayor's Policy and Executive Order. DESIGN-BUILD CONTRACTOR is responsible for securing and maintaining required documents from Subcontractors and Suppliers for the City inspection throughout the term of the Contract.
- 3.8.1.6 Failure of DESIGN-BUILD CONTRACTOR to comply with requirements will be a material breach of the Contract entitling the City to terminate in accordance with Paragraph 14.1.

#### 3.9 MATERIALS & EQUIPMENT

- 3.9.1 Unless otherwise provided in the Contract, DESIGN-BUILD CONTRACTOR shall provide and assume full responsibility for Products, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, transportation, temporary facilities, supplies, and other facilities and incidentals necessary for Furnishing, performing, testing, starting-up, and completing the Work.
  - 3.9.1.1 DESIGN-BUILD CONTRACTOR, Subcontractors, and Suppliers shall use Ultra Low Sulfur Diesel Fuel in all diesel operating vehicles and motorized equipment utilized in performing the Work. Ultra Low Sulfur Diesel Fuel is defined as diesel fuel having 15 ppm or the applicable standard set by state or federal law or rules and regulations of the Texas Commission on Environmental Quality, or the Environmental Protection Agency, whichever is less, in sulfur content. Off-road Ultra Low Sulfur Diesel Fuel may be used in lieu of on-road Ultra Low Sulfur Diesel Fuel. DESIGN-BUILD CONTRACTOR shall provide, upon request by Director, proof that DESIGN-BUILD CONTRACTOR, Subcontractors, and Suppliers are using Ultra Low Sulfur Diesel Fuel.
- 3.9.2 DESIGN-BUILD CONTRACTOR shall provide Products that are:
  - 3.9.2.1. new, unless otherwise required or permitted by the Contract, and
  - 3.9.2.2. of specified quality.

- If required by Director, DESIGN-BUILD CONTRACTOR shall furnish satisfactory evidence, including reports of required tests, as to kind and quality of Products.
- 3.9.3 DESIGN-BUILD CONTRACTOR shall store Products in a safe, neat, compact, and protected manner. DESIGN-BUILD CONTRACTOR shall also store Products delivered during the Work, along the right-of-way:
  - 3.9.3.1. so as to cause the least inconvenience to property owners, tenants, and general public;
  - 3.9.3.2. so as not to block access to, or be closer than, three feet to any fire hydrant; and
  - 3.9.3.3. so as not to put an unsafe load or distribution of weight on a particular area that causes damage.

DESIGN-BUILD CONTRACTOR shall protect trees, lawns, walks, drives, streets, and other improvements that are to remain, from damage. If private or public property is damaged by DESIGN-BUILD CONTRACTOR, DESIGN-BUILD CONTRACTOR shall, at its sole expense, restore the damaged property to at least its original condition.

3.9.34 DESIGN-BUILD CONTRACTOR shall obtain Director's approval for storage areas used for Products for which payment has been requested under Paragraph 9.2.2. DESIGN-BUILD CONTRACTOR shall provide the City access to the storage areas for inspection purposes. Products, once paid for by the City, become the property of the City and may not be removed from place of storage, without Director's written permission except for a movement to the Project site. DESIGN-BUILD CONTRACTOR's Installation Floater, required under Paragraph 11.2, shall cover all perils, including loss or damage to Products during storage, loading, unloading, and transit to the Project site. Payment for materials and transfer of ownership shall not alleviate DESIGN-BUILD CONTRACTOR's responsibility for corrective action should the material become defective or be determined by the Director to not be in compliance with the Contract Documents.

#### 3.10 PRODUCT OPTIONS AND SUBSTITUTIONS

- 3.10.1 For Products specified by reference standards or by description only, DESIGN-BUILD CONTRACTOR may provide any Product meeting those standards or description.
- 3.10.2 For Products specified by naming one or more manufacturers with provision for substitutions or equal, DESIGN-BUILD CONTRACTOR may submit a request for substitution for any manufacturer not named.
- 3.10.3 Director will consider requests for substitutions only within the first 15 percent (15%) of Contract Time or first ninety (90) days after date of Notice to Proceed, whichever is less.
- 3.10.4 DESIGN-BUILD CONTRACTOR shall document each request for substitution with complete data substantiating compliance of proposed substitution with the Contract.
- 3.10.5 A request for substitution constitutes a representation that DESIGN-BUILD CONTRACTOR:
  - 3.10.5.1. has investigated the proposed Product and determined that it meets or exceeds the quality standard of the specified Product;
  - 3.10.5.2. shall provide the same warranty for the substitution as for the specified Product;

- 3.10.5.3. shall coordinate installation of the proposed substitution and make changes to other work which may be required for the Work to be completed, with no additional cost or increase in time to the City:
- 3.10.5.4. confirms that cost data is complete and includes all related costs under the Contract Documents;
- 3.10.5.5. waives related Claim for additional costs or time extensions that may subsequently become apparent; and
- 3.10.5.6. shall provide review or redesign services by a Designer with appropriate professional license and shall obtain re-approval and permits from authorities.
- 3.10.6 Director will not consider and will not approve substitutions when:
  - 3.10.6.1. they are indicated or implied on Shop Drawing or Product Data submittals without separate written request; or
  - 3.10.6.2. acceptance will require revision to the Contract Documents.
- 3.10.7 Director may reject requests for substitution, and his decision will be final and binding on the Parties.

#### 3.11 CASH ALLOWANCES

- 3.11.1 A CGMP and the GMP may include Cash Allowances as identified in the Contract.
- 3.11.2 The City will pay the actual costs of Allowance items and they will be considered a Cost of the Work. If actual costs exceed the Cash Allowance, Director must approve a Change Order for the additional costs.

#### 3.12 WARRANTY

- 3.12.1 DESIGN-BUILD CONTRACTOR warrants to the City that Products furnished under the Contract are:
  - 3.12.1.1. free of defects in title;
  - 3.12.1.2. of good quality;
  - 3.12.1.3. new, unless otherwise required or permitted by the Contract; and
  - 3.12.1.4. free from defects and in strict conformance with the requirements of the Contract Documents.

If required by the Director, DESIGN-BUILD CONTRACTOR shall furnish satisfactory evidence as to kind, quality, and title of Products, and that Products conform to requirements of the Contract Documents.

- 3.12.2 In the event of a defect in a Product, either during construction or Correction Period, DESIGN-BUILD CONTRACTOR shall take appropriate action with manufacturer of Product to assure correction or replacement of defective Product with minimum delay.
- 3.12.3 DESIGN-BUILD CONTRACTOR warrants that the Work is free of defects not inherent in the quality required or permitted, and that the Work does conform with the requirements of

- the Contract. DESIGN-BUILD CONTRACTOR further warrants that the Work has been performed in a good, thorough and workmanlike manner.
- 3.12.3.1 If required in writing by the Director, DESIGN-BUILD CONTRACTOR shall furnish satisfactory evidence, including reports or required tests, as to kind, quality and title of Products, and that Products conform to requirements of the Contract Documents.
- 3.12.3..2 In the event of a defect in a Product, either during construction or Correction Period, DESIGN-BUILD CONTRACTOR shall take action with the manufacturer of the Product to assure correction or replacement of the defective Product with minimum delay, to the satisfaction of the Director.
- 3.12.4 DESIGN-BUILD CONTRACTOR warrants that the Work is free of concentrations on polychlorinated biphenyl (PCB) and other substances defined as hazardous by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) or any other applicable law or regulation. DESIGN-BUILD CONTRACTOR's warranty does not extend beyond DESIGN-BUILD CONTRACTOR's Work.
- 3.12.5 Work not conforming to requirements of Paragraph 3.12, including substitutions not properly approved and authorized, may be considered nonconforming work.
- 3.12.6 DESIGN-BUILD CONTRACTOR's warranty excludes remedy for damage or defect caused by:
  - 3.12.6.1 improper or insufficient maintenance by the City;
  - 3.12.6.2 normal wear and tear under normal usage; or
  - 3.12.6.3 claim that hazardous material was incorporated into the Work, if that material was specified in the Contract.
- 3.12.7 DESIGN-BUILD CONTRACTOR warrants that title to all work covered by DESIGN-BUILD CONTRACTOR's request for payment passes to the City upon incorporation into the Work or upon DESIGN-BUILD CONTRACTOR's receipt of payment, whichever occurs first. The DESIGN-BUILD CONTRACTOR further warrants that the title is free of all liens, claims, security interests or other interests ("Encumbrances"). If not, upon written demand from Director, DESIGN-BUILD CONTRACTOR shall immediately take legal action necessary to remove Encumbrances.

#### 3.13 *TAXES*

- 3.13.1 DESIGN-BUILD CONTRACTOR shall pay all applicable sales, consumer, use, and similar taxes, which are related to work provided by DESIGN-BUILD CONTRACTOR.
- 3.13.2 DESIGN-BUILD CONTRACTOR shall obtain, and require Subcontractors and Suppliers to obtain, necessary permits from applicable state and local taxing authorities to perform contractual obligations under the Contract, including sales tax permits (to the extent any sales or use tax exemption is not applicable).
- 3.13.3 The City is exempt from the Federal Transportation and Excise Tax. DESIGN-BUILD CONTRACTOR shall comply with federal regulations governing the exemptions.
- 3.13.4 Products incorporated into the Work are exempt from state sales tax according to provisions of the TEX. TAX CODE ANN. CH. 151, Subsection H.

# 3.14 PERMITS, FEES, AND NOTICES

- 3.14.1 Unless otherwise provided in the Contract, DESIGN-BUILD CONTRACTOR shall secure and pay for all construction permits, licenses, and inspections.
  - 3.14.1.1 necessary for proper execution and completion of the Work; and
  - 3.14.1.2 legally required at time the Director approves a CGMP or the GMP.
- 3.14.2 The DESIGN-BUILD CONTRACTOR shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work, including DESIGN-BUILD CONTRACTOR's or Subcontractor's licenses; neither City nor its agents, shall be responsible for monitoring DESIGN-BUILD CONTRACTOR's compliance with this requirement.

# 3.15 CONSTRUCTION SCHEDULES

- 3.15.1 Upon receipt of a Notice to Proceed, DESIGN-BUILD CONTRACTOR shall promptly prepare and submit a construction schedule for the Work for Director's review. schedule must reflect the minimum time required to complete the Work, not to exceed Contract Time. The Director will define what project management/scheduling software systems will be employed for execution of the Work. DESIGN-BUILD CONTRACTOR shall make its own arrangements to produce his schedule using the same or approved compatible software. DESIGN-BUILD CONTRACTOR shall be responsible for assuring that all work, including all subcontractor work, is included in the schedule. DESIGN-BUILD CONTRACTOR shall be responsible for assuring that all work sequences are logical and that the schedule indicates a coordinated plan. At a minimum, the schedule shall provide information on the sequence of work activities, interdependence of activities, milestone dates and activity duration. DESIGN-BUILD CONTRACTOR shall maintain the work schedule and provide an update and analysis of the progress on a monthly basis, with the monthly billing. Submission of the work schedule shall not relieve DESIGN-BUILD CONTRACTOR of overall responsibility for scheduling sequencing and coordinating all work to comply with the requirements of the contract.
- 3.15.2 DESIGN-BUILD CONTRACTOR shall give 24-hour written notice to Director before commencing work or resuming work where work has been stopped. DESIGN-BUILD CONTRACTOR shall also give the same notice to inspectors.
- 3.15.3 DESIGN-BUILD CONTRACTOR shall incorporate milestones specified in Summary of Work Specification into the construction schedule. DESIGN-BUILD CONTRACTOR's failure to meet a milestone, as determined by Director, may be considered a material breach of the Contract.
- 3.15.4 Each month, DESIGN-BUILD CONTRACTOR shall submit to Director a copy of an updated construction schedule indicating actual progress, incorporating applicable changes, and indicating courses of action required to assure completion of the Work within Contract Time.
- 3.15.5 DESIGN-BUILD CONTRACTOR shall keep a current schedule of all submittals that correlates with the construction schedules, and shall submit the initial schedule of submittals and any subsequent changes to Director for approval.

# 3.16 **DOCUMENTS AND SAMPLES AT THE SITE**

- 3.16.1 DESIGN-BUILD CONTRACTOR shall maintain at the site, and make available to Director, one record copy of Drawings, Specifications, and Modifications. DESIGN-BUILD CONTRACTOR shall maintain the documents in good order and marked currently to record changes and selections made during construction. In addition, DESIGN-BUILD CONTRACTOR shall maintain at the site, approved Shop Drawings, Product Data, Samples, and similar submittals, which will be delivered to Director prior to final inspection as required in Paragraph 9.11.4.
- 3.16.3 DESIGN-BUILD CONTRACTOR shall provide to City Attorney all documents and records that City Attorney deems necessary to assist in determining DESIGN-BUILD CONTRACTOR's compliance with the Contract, with the exception of those documents made confidential by federal or state law or regulation.

# 3.17 MANUFACTURER'S SPECIFICATIONS

- 3.17.1 DESIGN-BUILD CONTRACTOR shall handle, store, protect, and Install Products and perform all work in the manner required by Product manufacturer. Should the Contract and manufacturer's instructions conflict, DESIGN-BUILD CONTRACTOR shall report conflict to Director for resolution prior to proceeding with the affected portions of the Work.
- 3.17.2 References in the Contract to the manufacturer's specifications, directions, or recommendations, mean manufacturer's current published documents in effect as of a CGMP or the GMP proposal, or in the case of a Modification, as of date of Modification.

#### 3.18 SHOP DRAWINGS, PRODUCT DATA, AND SAMPLES

- 3.18.1 Shop Drawings, Product Data, and Samples are not part of the Contract. The purpose of DESIGN-BUILD CONTRACTOR submittals is to demonstrate, for those portions of the Work for which submittals are required, the way DESIGN-BUILD CONTRACTOR proposes to conform to information given and design concept expressed in the Contract. DESIGN-BUILD CONTRACTOR shall submit required submittals and requests for information (RFIs) into the HAS project management system. Access to the project management system portal and required training will be coordinated through the Director.
- DESIGN-BUILD CONTRACTOR shall submit to Director for review the Shop Drawings, Product Data, and Samples, which are required by the Contract Documents. Review by Director is subject to limitations of Paragraph 4.1.4. DESIGN-BUILD CONTRACTOR shall transmit the submittals to the Director with reasonable promptness and in a sequence, so as to cause no delay in the Work or in activities of the City or of separate Contractors. DESIGN-BUILD CONTRACTOR shall transmit submittals in time to allow a minimum of fourteen (14) days for Director's review prior to date DESIGN-BUILD CONTRACTOR needs reviewed submittals returned. This time may be shortened for a particular job requirement if approved by Director in advance of submittal.
- 3.18.3 DESIGN-BUILD CONTRACTOR shall certify that the content of submittals conforms to the Contract without exception by affixing DESIGN-BUILD CONTRACTOR's approval stamp and signature. By certifying and submitting Shop Drawings, Product Data, and Samples, DESIGN-BUILD CONTRACTOR represents, and DESIGN-BUILD CONTRACTOR's stamp of approval shall state, that DESIGN-BUILD CONTRACTOR has determined and verified materials, quantities, field measurements, and field construction criteria related to the submittal, and has checked and coordinated information contained within the submittals with requirements of the Contract and for compatibility with other submittals.

- 3.18.4 DESIGN-BUILD CONTRACTOR may not perform any work requiring submittal and review of Shop Drawings, Product Data, or Samples until the submittal has been returned with appropriate review decision by the Director. DESIGN-BUILD CONTRACTOR shall perform Work in accordance with the review.
- 3.18.5 If DESIGN-BUILD CONTRACTOR performs any Work requiring submittals prior to review and acceptance of the submittals by Director, such Work is at DESIGN-BUILD CONTRACTOR's risk and the City is not obligated to accept Work if the submittals are later found to be unacceptable.
- 3.18.6 If, in the opinion of Director, the submittals are incomplete, or demonstrate an inadequate understanding of the Work or lack of review by the DESIGN-BUILD CONTRACTOR, then submittals may be returned to the DESIGN-BUILD CONTRACTOR for correction and resubmittal.
- 3.18.7 DESIGN-BUILD CONTRACTOR shall direct specific attention in writing and on the resubmitted Shop Drawings, Product Data, or Samples to any additional proposed revisions, other than those revisions requested by Director on previous submittals.
- 3.18.8 DESIGN-BUILD CONTRACTOR is not relieved of responsibility for deviations from requirements of the Contract by Director's review or approval of Shop Drawings, Product Data, or Samples unless DESIGN-BUILD CONTRACTOR has specifically informed Director in writing of the deviation at the time of the submittal, and Director has given written approval of the deviation.
- 3.18.9 When professional certification of performance criteria of Products is required by the Contract, the City may rely upon accuracy and completeness of the calculations and certifications.
- 3.18.10 For Product colors or textures to be selected by the City, DESIGN-BUILD CONTRACTOR shall submit all samples together to allow preparation of a complete selection schedule.
- 3.18.11 DESIGN-BUILD CONTRACTOR shall submit informational submittals, on which Director is not expected to take responsive action, as required by the Contract.
- 3.18.12 Submittals made by DESIGN-BUILD CONTRACTOR which are not required by the Contract may be returned to DESIGN-BUILD CONTRACTOR without action.

#### 3.19 CULTURAL RESOURCES AND ENDANGERED SPECIES

- 3.19.1 DESIGN-BUILD CONTRACTOR may not remove or disturb, or cause to be removed or disturbed, any historical, archaeological, architectural, or other cultural artifacts, relics, vestiges, remains, or objects of antiquity. If DESIGN-BUILD CONTRACTOR discovers one of these items, DESIGN-BUILD CONTRACTOR shall immediately notify Director and further comply with the requirements of 13 Tex. Admin. Code Chs. 25 and 26 (2002), or successor regulation. DESIGN-BUILD CONTRACTOR shall protect site and cultural resources from further disturbance until professional examination can be made or until clearance to proceed is authorized in writing by Director.
- 3.19.2 Should either threatened or endangered plant or animal species be encountered, DESIGN-BUILD CONTRACTOR shall cease work immediately in the area of encounter and notify Director.

#### 3.20 CUTTING AND PATCHING

- 3.20.1 DESIGN-BUILD CONTRACTOR is responsible for necessary cutting, fitting, and patching to accomplish the Work and shall suitably support, anchor, attach, match, and trim or seal materials to work of other Contractors. DESIGN-BUILD CONTRACTOR shall coordinate the Work with work of other Contractors to minimize conflicts, as provided in Article 6.
- 3.20.2 DESIGN-BUILD CONTRACTOR may not endanger work by cutting, digging, or other action, and may not cut or alter work of other Contractors except by written consent of Director.
- 3.20.3 If authorized by Director, cutting shall be accurately located and neatly done. Unnecessary cutting shall be avoided. Patching shall be done by skilled mechanics experienced in the particular type of work involved. Patching work shall conform to the standards of the Drawings and Specifications where applicable, and where not specified, such work shall conform to the highest standards of the trade. Finished patching in the work of a separate Contractor shall be acceptable to the Contractor whose work has been patched.
- 3.20.4 DESIGN-BUILD CONTRACTOR shall leave all holes, chases, and other openings in its construction required by other Contractors for the installation of their work, provided such openings are accurately located by the party requiring them before the execution of the construction. DESIGN-BUILD CONTRACTOR shall afford other Contractors a reasonable opportunity to locate such openings.

# 3.21 CLEANING

- 3.21.1 DESIGN-BUILD CONTRACTOR shall perform daily cleanup of all dirt, debris, scrap materials and other disposable items resulting from DESIGN-BUILD CONTRACTOR's operations, whether on-site or off-site. Unless otherwise authorized in writing by Director, DESIGN-BUILD CONTRACTOR shall keep all streets, access streets, driveways, areas of public access, walkways, and other designated areas clean and open at all times.
- 3.21.2 Failure of DESIGN-BUILD CONTRACTOR to maintain a clean site, including access streets, is the basis for Director to issue a Notice of Noncompliance. Should compliance not be attained within the time period in the Notice of Noncompliance, Director may authorize necessary cleanup to be performed by others and the cost of the cleanup will be deducted from monies due DESIGN-BUILD CONTRACTOR.
- 3.21.3 DESIGN-BUILD CONTRACTOR shall legally dispose off site all waste materials and other excess materials resulting from DESIGN-BUILD CONTRACTOR's on site and off site operations.

#### 3.22 SANITATION

3.22.1 DESIGN-BUILD CONTRACTOR shall provide and maintain sanitary facilities at site for use of all construction forces under the Contract. Newly-constructed or existing sanitary facilities may not be used by DESIGN-BUILD CONTRACTOR.

#### 3.23 ACCESS TO WORK AND TO INFORMATION

3.23.1 DESIGN-BUILD CONTRACTOR shall provide the City, Inspectors, testing laboratories, and governmental agencies which have jurisdictional interests, access to the Work in preparation and in progress wherever located. DESIGN-BUILD CONTRACTOR shall provide proper and safe conditions for the access.

3.23.2 If required by Director, DESIGN-BUILD CONTRACTOR shall furnish information concerning character of Products and progress and manner of the Work, including information necessary to determine cost of the Work, such as number of employees, pay of employees, and time employees worked on various classes of the Work.

## 3.24 TRADE SECRETS

3.24.1 DESIGN-BUILD CONTRACTOR will not make any claim of ownership of trade secrets as to Products used in the Work, or preparation of any mixture for the Work. The Director will at all times have the right to demand and DESIGN-BUILD CONTRACTOR shall furnish information concerning materials or samples of ingredients of any materials used, or proposed to be used, in preparation of concrete placed or other work to be done. Mixtures, once agreed on, shall not be changed in any manner without knowledge and consent of Director. The City will make its best efforts to protect confidentiality of proprietary information.

## 3.25 RELEASE AND INDEMNIFICATION

- 3.25.1 DESIGN-BUILD CONTRACTOR AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS CONTRACT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S SOLE OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCT'S LIABILITY OR STRICT STATUTORY LIABILITY.
- 3.25.2 DESIGN-BUILD CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THE CONTRACT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:
  - 3.25.2.1 DESIGN-BUILD CONTRACTOR'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' (COLLECTIVELY IN NUMBERED SUBPARAGRAPHS 3.25.2.1 THROUGH 3.25.2.3, "DESIGN-BUILD CONTRACTOR") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;
  - 3.25.2.2 THE CITY'S AND DESIGN-BUILD CONTRACTOR'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER DESIGN-BUILD CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT; AND
  - 3.25.2.3 THE CITY'S AND DESIGN-BUILD CONTRACTOR'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER DESIGN-BUILD CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT.
- 3.25.3 DESIGN BUILD CONTRACTOR'S DUTY TO DEFEND, INDEMNIFY AND HOLD HARMLESS THE CITY SHALL SURVIVE ANY TERMINATION OF THIS AGREEMENT.
- 3.25.4 THE INDEMNIFICATION OBLIGATIONS HEREUNDER SHALL NOT BE LIMITED IN ANY WAY BY THE LIMITS OF ANY INSURANCE COVERAGE OR ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS

PAYABLE BY, FOR, OR TO DESIGN-BUILD CONTRACTOR OR ANY SUBCONTRACTOR, SUPPLIER, OR ANY OTHER INDIVIDUAL OR ENTITY UNDER ANY INSURANCE POLICY, WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFITS ACTS.

# 3.26 <u>RELEASE AND INDEMNIFICATION – PATENT, COPYRIGHT, TRADEMARK, AND TRADE</u> SECRET INFRINGEMENT

- 3.26.1 UNLESS OTHERWISE SPECIFICALLY REQUIRED BY THE CONTRACT, DESIGNBUILD CONTRACTOR AGREES TO AND SHALL RELEASE AND DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL CLAIMS OR CAUSES OF ACTION BROUGHT AGAINST THE CITY BY ANY PARTY, INCLUDING DESIGN-BUILD CONTRACTOR, ALLEGING THAT THE CITY'S USE OF ANY EQUIPMENT, SOFTWARE, PROCESS, OR DOCUMENTS DESIGN-BUILD CONTRACTOR FURNISHES DURING THE TERM OF THE CONTRACT INFRINGES ON A PATENT, COPYRIGHT, SERVICE MARK, OR TRADEMARK, OR MISAPPROPRIATES A TRADE SECRET. DESIGN-BUILD CONTRACTOR SHALL PAY, SUBJECT TO REIMBURSEMENT IF ALLOWED UNDER THE CONTRACT, ALL COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS, AND INTEREST) AND DAMAGES AWARDED.
- 3.26.2 DESIGN-BUILD CONTRACTOR SHALL NOT SETTLE ANY CLAIM ON TERMS WHICH PREVENT THE CITY FROM USING THE EQUIPMENT, SOFTWARE, PROCESS, OR PRODUCT WITHOUT THE DIRECTOR'S PRIOR WRITTEN CONSENT.
- 3.26.3 UNLESS OTHERWISE SPECIFICALLY REQUIRED BY THE CONTRACT, WITHIN SIXTY (60) DAYS AFTER BEING NOTIFIED OF THE CLAIM, DESIGN-BUILD CONTRACTOR SHALL, AT ITS OWN EXPENSE, EITHER:
  - 3.26.3.1 OBTAIN FOR THE CITY THE RIGHT TO CONTINUE USING THE EQUIPMENT, SOFTWARE, PROCESS, OR PRODUCT, OR
  - 3.26.3.2 IF BOTH PARTIES AGREE, REPLACE OR MODIFY THEM WITH COMPATIBLE AND FUNCTIONALLY EQUIVALENT PRODUCTS.

IF NONE OF THESE ALTERNATIVES IS REASONABLY AVAILABLE, THE CITY MAY RETURN THE EQUIPMENT, SOFTWARE, OR PRODUCT, OR DISCONTINUE THE PROCESS, AND DESIGN-BUILD CONTRACTOR SHALL REFUND THE PURCHASE PRICE.

## 3.27 <u>INDEMNIFICATION PROCEDURES</u>

- 3.27.1 Notice of Indemnification Claims. If the City or DESIGN-BUILD CONTRACTOR receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other Party within ten (10) days. The notice must include the following:
  - 3.27.1.1 a description of the indemnification event in reasonable detail,
  - 3.27.1.2 the basis on which indemnification may be due, and
  - 3.27.1.3 the anticipated amount of the indemnified loss.

This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If the City does not provide this notice within the 10-day period, it does not waive any right to indemnification except to the extent that DESIGN-BUILD CONTRACTOR is prejudiced, suffers loss, or incurs expense because of the delay.

#### 3.27.2 Defense of Indemnification Claims.

- 3.27.2.1 Assumption of Defense. DESIGN-BUILD CONTRACTOR may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. DESIGN-BUILD CONTRACTOR shall then control the defense and any negotiations to settle the claim. Within ten (10) days after receiving written notice of the indemnification request, DESIGN-BUILD CONTRACTOR must advise the City as to whether or not it will defend the claim. If DESIGN-BUILD CONTRACTOR does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnified loss.
- 3.27.2.2 Continued Participation. If DESIGN-BUILD CONTRACTOR elects to defend the claim, the City may retain separate counsel to participate in, but not control, the defense and to participate in, but not control, any settlement negotiations. DESIGN-BUILD CONTRACTOR may settle the claim without the consent or agreement of the City, unless it:
  - 3.27.2.2.1 would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City;
  - 3.27.2.2.2 would require the City to pay amounts that DESIGN-BUILD CONTRACTOR does not fund in full; or
  - 3.27.2.2.3 would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

#### **ARTICLE 4 - ADMINISTRATION OF THE CONTRACT**

# 4.1 <u>CONTRACT ADMINISTRATION</u>

- 4.1.1 Director will provide administration of the Contract, and, subject to Paragraph 7.1.2, Director is authorized to issue Change Orders, Work Change Directives, and Minor Changes in the Work.
- 4.1.2 The City does not have control over or charge of, and is not responsible for, supervision, construction, and safety procedures enumerated in Paragraph 3.3. The City does not have control over or charge of and is not responsible for acts or omissions of DESIGN-BUILD CONTRACTOR, Subcontractors, or Suppliers.
- 4.1.3 The Director may attend project meetings and visit the Project site to observe progress and quality of the Work. The Director is not required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work.
- 4.1.4 Director will review and approve or take other appropriate action on DESIGN-BUILD CONTRACTOR's submittals, but only for limited purpose of checking for conformance with information given and design concept expressed in the Contract.

- 4.1.4.1 Director's review of the submittals is not conducted for purpose of determining accuracy and completeness of other details, such as dimensions and quantities, or for substantiating instructions for installation or performance of Products, all of which remain the responsibility of DESIGN-BUILD CONTRACTOR.
- 4.1.4.2 Director's review and/or acceptance of submittals does not relieve DESIGN-BUILD CONTRACTOR of it's obligations to perform the Work in strict conformance with the Contract Documents, including without limitation DESIGN-BUILD CONTRACTOR's obligations under Paragraphs 3.3, 3.10, 3.12, 3.16, and 3.18 of these Document 00700-General Conditions and shall not constitute approval of safety precautions or, unless otherwise specifically stated by Director in writing, of any construction means, methods, techniques, sequences, or procedures. Director review and/or acceptance of a specific item does not indicate approval of an assembly of which the item is a component.
- 4.1.4.3 The Director's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.
- 4.1.5 Based on field observations and evaluations, Director will process DESIGN-BUILD CONTRACTOR's progress payments, certify amounts due DESIGN-BUILD CONTRACTOR, and issue Certificates for Payment in the amount certified.
- 4.1.6 DESIGN-BUILD CONTRACTOR shall deliver to Director for his review and records, written warranties and related documents required by the Contract Documents and assembled by DESIGN-BUILD CONTRACTOR.
- 4.1.7 Upon written request by DESIGN-BUILD CONTRACTOR or Director, Director will resolve matters of interpretation of or performance of the Contract, which are not Claims. Director's decisions are final and binding on the Parties.
- 4.1.8 Director may reject Work which does not conform to the Contract.
- 4.1.9 When Director considers it necessary to implement the intent of the Contract, Director may require additional inspection or testing of work in accordance with Paragraphs 13.6.3 and 13.6.4, whether such work is fabricated, Installed, or completed.
- 4.1.10 Except as expressly stated in this Article or other provisions of the Contract or these Document 00700-General Conditions, the City owes no duty to the DESIGN-BUILD CONTRACTOR or any subcontractor.

## 4.2 COMMUNICATIONS IN ADMINISTRATION OF THE CONTRACT

- 4.2.1 Except as otherwise provided in the Contract or when authorized by Director in writing, DESIGN-BUILD CONTRACTOR shall communicate with and through the Director. DESIGN-BUILD CONTRACTOR shall communicate with separate Contractors through Director. The Director will communicate with Subcontractors and Suppliers through DESIGN-BUILD CONTRACTOR, but Director is entitled to communicate directly with Subcontractors and Suppliers at any time to obtain information.
- 4.2.2 Inspectors employed by the City shall be authorized to inspect all work done and materials furnished. Such inspection may extend to all or any part of the work and to the preparation, fabrication or manufacture of the materials to be used. Inspectors are not authorized to revoke, alter or waive any provision of the contract. Inspectors are not authorized to issue instructions contrary to the plans and specifications or to act as foreman for the DESIGN-BUILD CONTRACTOR or its subcontractors.

# 4.3 CLAIMS AND DISPUTES

- 4.3.1 *Documentation by Director:* DESIGN-BUILD CONTRACTOR shall submit Claims, to Director for documentation and recommendation to Director.
- 4.3.2 *Decision of Director:* Upon submission of Claim by Director or DESIGN-BUILD CONTRACTOR, Director will resolve Claims in accordance with Paragraph 4.4.
- 4.3.3 Time Limits on Claims: Claims by DESIGN-BUILD CONTRACTOR must be made within ninety-one (91) days after the occurrence of the event giving rise to the Claim. Claims by DESIGN-BUILD CONTRACTOR not made within the time required in the required manner shall be deemed waived by DESIGN-BUILD CONTRACTOR. DESIGN-BUILD CONTRACTOR must give initial notice to the Director of an event that DESIGN-BUILD CONTRACTOR views as one that might give rise to a Claim within seven (7) days of the event.
- 4.3.4 Continuing the Contract Performance: Pending final resolution of a Claim including referral to non-binding mediation, unless otherwise agreed in writing, DESIGN-BUILD CONTRACTOR shall proceed diligently with the performance of the Contract and the City will continue to make payments in accordance with the Contract.
  - 4.3.4.1 Pending final resolution of a Claim including referral to non-binding mediation, DESIGN-BUILD CONTRACTOR is responsible for safety and protection of physical properties and conditions at the Project site.
- 4.3.5 Claims for Concealed or Unknown Conditions: Concealed or unknown physical conditions may include utility lines, other man-made structures, storage facilities, Pollutants and Pollutant Facilities, and the like, but do not include conditions discovered or that reasonably should have been discovered through reasonable visual site inspection, testina. geotechnical information available to **DESIGN-BUILD** CONTRACTOR, or to the extent otherwise reasonably discoverable by a reasonably prudent DESIGN-BUILD CONTRACTOR, or that do not materially differ from those indicated in the Contract Documents, or information provided by City or those that should reasonably be anticipated, arising from DESIGN-BUILD CONTRACTOR's operations, or failure of DESIGN-BUILD CONTRACTOR to properly protect and safeguard subsurface facilities, or that do not materially differ from those indicated in the Contract Documents, or information provided by City or those that should reasonably be anticipated. Subject to the foregoing, concealed conditions also include naturally-occurring soil conditions outside the range of soil conditions identified through geotechnical investigations, but do not include conditions arising from groundwater, rain, or flood.
  - 4.3.5.1 If conditions are encountered at the site which are Underground Facilities or otherwise concealed or unknown conditions which differ materially from:
    - 4.3.1.1.1 those indicated by the Contract Documents; or
    - 4.3.1.1.2 conditions which DESIGN-BUILD CONTRACTOR reasonably could have discovered through site inspection, geotechnical testing, or to the extent otherwise reasonably discoverable by a reasonably prudent DESIGN-BUILD CONTRACTOR;

then DESIGN-BUILD CONTRACTOR will give written notice to Director no later than seven (7) days after DESIGN-BUILD CONTRACTOR's first observation of the condition and before condition is disturbed. DESIGN-BUILD CONTRACTOR's failure to provide notice constitutes a waiver of a Claim.

- 4.3.5.2 Director will promptly investigate concealed or unknown conditions. If Director determines that conditions at the site are not materially different from those indicated in the Contract and that no change in a CGMP, the GMP, or Contract Time is justified, Director will notify DESIGN-BUILD CONTRACTOR in writing, stating reasons. If Director determines the conditions differ materially from those indicated by the Contract and cause increase or decrease in DESIGN-BUILD CONTRACTOR's cost or time required for performance of part of the Work, Director will recommend an adjustment in a CGMP, the GMP, or Contract Time, or both (CGMP/GMP, as applicable, and Contract Time), as provided in Article 7. Opposition by a Party to the Director's determination must be made within twenty-one (21) days after Director has given notice of the decision. If the Parties cannot agree on adjustment to a CGMP, the GMP or Contract Time, adjustment is subject to further proceedings pursuant to Paragraph 4.4.
- 4.3.6 Claims for Additional Cost: If DESIGN-BUILD CONTRACTOR wishes to make a Claim for increase in a CGMP or the GMP, DESIGN-BUILD CONTRACTOR shall give written notice before proceeding with work for which DESIGN-BUILD CONTRACTOR intends to submit a Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.4.
  - 4.3.6.1 DESIGN-BUILD CONTRACTOR may file a Claim in accordance with Paragraph 4.4 if DESIGN-BUILD CONTRACTOR believes it has incurred additional costs, for the following reasons:
    - 4.3.6.1.1 written interpretation of Director contrary to the terms of the Contract Documents;
    - 4.3.6.1.2 order by Director to stop the Work when DESIGN-BUILD CONTRACTOR is not at fault, except when the direction is given to coordinate the Work;
    - 4.3.6.1.3 suspension of the Work by Director;
    - 4.3.6.1.4 termination of the Contract by Director; or
    - 4.3.6.1.5 The City's non-compliance with another provision of the Contract Documents.
  - 4.3.6.2 Except as otherwise agreed to by the Director, no increase in a CGMP or the GMP is allowed for delays or hindrances to the Work provided in Paragraph 8.2.1.
  - 4.3.6.3 The City is not liable for Claims for delay when Date of Substantial Completion of a phase of Construction occurs prior to expiration of Contract Time.
- 4.3.7 Claims for Additional Time: If DESIGN-BUILD CONTRACTOR wishes to make a Claim for an increase in Contract Time, DESIGN-BUILD CONTRACTOR shall give written notice as provided in Paragraph 8.2. In case of continuing delay, only one Claim is necessary.

## 4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Director will review Claims and take one or more of the following preliminary actions within thirty (30) days of receipt of Claim:

- 4.4.1.1 submit a suggested time to meet and discuss the Claim with DESIGN-BUILD CONTRACTOR:
- 4.4.1.2 reject Claim, in whole or in part, stating reasons for rejection;
- 4.4.1.3 recommend approval of the Claim;
- 4.4.1.4 suggest a compromise; or
- 4.4.1.5 take other actions as Director deems appropriate to resolve the Claim.
- 4.4.2 Director may request additional supporting data from claimant. Party making Claim shall, within ten (10) days after receipt of Director's request, submit additional supporting data requested by Director.
- 4.4.3 At any time prior to rendering a written decision regarding a Claim, Director may refer Claim to non-binding mediation. If the Claim is resolved, Director will prepare and obtain all appropriate documentation. If the Claim is not resolved, Director will take receipt of Claim and begin a new review under Paragraph 4.4.
- 4.4.4. If Claim is not referred to or settled in non-binding mediation, Director may conduct a hearing and will render a written decision, including findings of fact, within seventy-five (75) days of receipt of the Claim, or a time mutually agreed upon by the Parties in writing. Director may notify Surety and request Surety's assistance in resolving a Claim. Director's decision is final and binding on the Parties.

# 4.5 CONDITION PRECEDENT TO SUIT, WAIVER OF ATTORNEY FEES, AND INTEREST

- 4.5.1 Compliance with the Dispute Resolution Process is an absolute condition precedent to the filing of any dispute in any judicial or administrative tribunal.
- 4.5.2 Except as allowed by TEXAS GOVERNMENT CODE Chapter 2251, neither the City nor DESIGN-BUILD CONTRACTOR may recover attorney fees for any claim brought in connection with this Contract.
- 4.5.3 Neither the City nor the DESIGN-BUILD CONTRACTOR may recover interest for any damages claim brought in connection with this Contract except as allowed by TEXAS GOVERNMENT CODE Chapter 2251.

## 4.6 NOTICE, WAIVER, & RELEASE

- 4.6.1 In accordance with Paragraph 4.3, the DESIGN-BUILD CONTRACTOR shall use due diligence in the discovery and submission of any Claim against the City related to the DESIGN-BUILD CONTRACTOR's work.
- 4.6.2 The DESIGN-BUILD CONTRACTOR shall submit any Claim to the City not later than the ninety-first (91<sup>st</sup>) day after the occurrence of the event giving rise to the Claim.
- 4.6.3 Any failure to timely comply with the requirements of Paragraph 4.6.2 waives and releases any Claim when the DESIGN-BUILD CONTRACTOR submits an application for payment after the ninety-first (91<sup>st</sup>) day.
- 4.6.4 This waiver does not cover any retainage. In case of any conflict of law, this language shall be revised to the minimum extent necessary to avoid legal conflict. This waiver is made specifically for the benefit of the City.

## **ARTICLE 5 - SUBCONTRACTORS AND SUPPLIERS**

## 5.1 AWARD OF SUBCONTRACTS OTHER CONTRACTS FOR PORTIONS OF THE WORK

- 5.1.1 DESIGN-BUILD CONTRACTOR may not contract with a Subcontractor, Supplier, person, or entity that Director has made a reasonable and timely objection to.
- 5.1.2 If Director has a reasonable objection to person or entity proposed by DESIGN-BUILD CONTRACTOR, DESIGN-BUILD CONTRACTOR shall propose another with whom Director has no reasonable objection.
- 5.1.3 DESIGN-BUILD CONTRACTOR shall execute contracts with approved Subcontractors. Suppliers, persons, or entities before the Subcontractors or Suppliers begin work under the Contract. All such contracts must be executed and sent to the OBO Director and HAS within thirty (30) days after the date of the Notice to Proceed and must include provisions set forth in Articles 3 and 5 of this Document.
- 5.1.4 DESIGN-BUILD CONTRACTOR shall notify Director in writing of any proposed change of Subcontractor, Supplier, person or entity previously accepted by the City.
- 5.1.5 DESIGN-BUILD CONTRACTOR shall make timely payments to Subcontractors and Suppliers for performance of the Contract Documents. DESIGN-BUILD CONTRACTOR SHALL PROTECT, DEFEND, AND INDEMNIFY THE CITY FROM ANY CLAIM OR LIABILITY ARISING OUT OF DESIGN-BUILD CONTRACTOR'S FAILURE TO MAKE THE PAYMENTS. Disputes relating to payment of Business Enterprise Subcontractors or Suppliers will be submitted to mediation in the same manner as other disputes under Business Enterprise subcontracts. Failure of DESIGN-BUILD CONTRACTOR to comply with decisions of mediator may be determined by Director a material breach leading to termination of the Contract.

# 5.2 DESIGN-BUILD CONTRACTOR RESPONSIBILITY FOR SUBCONTRACTORS

- 5.2.1 DESIGN-BUILD CONTRACTOR is responsible to the City, as may be required by laws and regulations, for all acts and omissions of Subcontractors, Suppliers, and other persons and organizations performing or furnishing any of the Work under direct or indirect contract with DESIGN-BUILD CONTRACTOR.
- 5.2.2 DESIGN-BUILD CONTRACTOR shall make available to each proposed Subcontractor, prior to execution of subcontract, copies of the Contract to which Subcontractor is bound by this Paragraph 5.2. DESIGN-BUILD CONTRACTOR shall notify Subcontractor of any terms of proposed subcontract which may be at variance with the Contract.
- 5.2.3 The Director's approval of Subcontractor or Suppliers does not relieve DESIGN-BUILD CONTRACTOR of its obligation to perform, or to have performed to the full satisfaction of the City, the Work required by the Contract.
- 5.2.4 Unless there is a contractual relationship between DESIGN-BUILD CONTRACTOR and a Subcontractor or Supplier to the contrary, DESIGN-BUILD CONTRACTOR shall withhold no more retainage from Subcontractors or Suppliers than City withholds from DESIGN-BUILD CONTRACTOR under this Contract. However, once a Subcontractor or Supplier completes performance, DESIGN-BUILD CONTRACTOR shall release all retainage to that Subcontractor or Supplier promptly upon the City's early payment of said retainage, in the discretion of the Director.

5.2.5 Prior to a Subcontractor or Supplier commencing performance for DESIGN-BUILD CONTRACTOR, DESIGN-BUILD CONTRACTOR shall meet with that Subcontractor or Supplier to provide instructions on invoicing procedures, dispute resolution procedures, and statutory rights, such as Section 2253 of the Texas Government Code. Subcontractors and Suppliers must certify to the Director DESIGN-BUILD CONTRACTOR has fulfilled the requirements of this Paragraph.

## ARTICLE 6 - CONSTRUCTION BY THE CITY OR BY SEPARATE CONTRACTORS

# 6.1 <u>THE CITY'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS</u>

6.1.1 The City shall have the right to perform on-site construction operations related to the Work and as part of the Project with its own forces or with separate Contractors.

# 6.2 <u>COORDINATION</u>

- 6.2.1 The DESIGN-BUILD CONTRACTOR will coordinate its activities with those of the City's workforce and of each separate Contractor and DESIGN-BUILD CONTRACTOR shall cooperate with the City and separate Contractors.
  - 6.2.1.1 DESIGN-BUILD CONTRACTOR shall participate with other separate Contractors and the City in reviewing their construction schedules when directed to do so by the Director. DESIGN-BUILD CONTRACTOR shall make revisions to the construction schedule deemed necessary after joint review and mutual agreement. Construction schedules shall then constitute schedules to be used by DESIGN-BUILD CONTRACTOR, separate Contractors, and the City, until subsequently revised.
- 6.2.2 DESIGN-BUILD CONTRACTOR shall afford to the City and to separate Contractors reasonable opportunity for introduction and storage of their materials and equipment, and for performance of their activities.
- 6.2.3 If part of DESIGN-BUILD CONTRACTOR's work depends on proper execution of construction or operations by the City or a separate Contractor, DESIGN-BUILD CONTRACTOR shall, prior to proceeding with that portion of the Work, inspect the other work and promptly report to Director apparent discrepancies or defects in the other construction that would render it unsuitable for the proper execution of the Work. Failure of DESIGN-BUILD CONTRACTOR to report apparent discrepancies or defects in the other construction shall constitute acknowledgment that the City's or separate Contractor's completed or partially completed construction is fit and proper to receive DESIGN-BUILD CONTRACTOR's work, except as to discrepancies or defects not then reasonably discoverable.

# 6.3 MUTUAL RESPONSIBILITY

6.3.1 DESIGN-BUILD CONTRACTOR shall prosecute its Work in a prompt and diligent manner in accordance with the Project schedule, in cooperation with and without hindering the work of any other separate Contractor of the City. DESIGN-BUILD CONTRACTOR SHALL PROMPTLY REMEDY DAMAGE CAUSED BY DESIGN-BUILD CONTRACTOR TO COMPLETED OR PARTIALLY COMPLETED CONSTRUCTION OR TO PROPERTY OF CITY, OR ITS SEPARATE CONTRACTOR OR OTHERS, AND SHALL DEFEND, HOLD HARMLESS AND INDEMNIFY THE CITY FOR ALL CLAIMS OR LIABILITY, IF ANY, ARISING OUT OF ANY HINDRANCE, DELAY OR DAMAGE BY DESIGN-BUILD CONTRACTOR TO THE WORK OR PROPERTY OF OTHERS.

# 6.4 THE CITY'S RIGHT TO CLEAN UP

6.4.1 If a dispute arises among DESIGN-BUILD CONTRACTOR, separate Contractors, and the City as to responsibility under their respective contracts for maintaining premises and surrounding area free from waste materials and rubbish as described in Paragraph 3.21, the City may clean up and allocate cost among those responsible, as determined by Director.

## **ARTICLE 7 - CHANGES IN THE WORK**

# 7.1 CHANGES

- 7.1.1 Changes in scope of the Work, subject to limitations in Article 7 and elsewhere in the Contract, may be accomplished without invalidating the Contract, or without notifying Surety by:
  - 7.1.1.1 Change Order;
  - 7.1.1.2 Work Change Directive; or
  - 7.1.1.3 Minor Change in the Work.
- 7.1.2 The following types of Change Orders require City Council approval:
  - 7.1.2.1 a single Change Order that exceeds ten percent (10%) of the GMP,
  - 7.1.2.2 a Change Order which, when added to previous Change Orders, exceeds ten percent (10%) of the GMP,
  - 7.1.2.3 a Change Order, in which the total value of increases outside of the general scope of work approved by City Council, when added to increases outside the general scope of work approved by City Council in previous Change Orders, exceeds forty percent (40%) of the GMP, even if the net increase to the Original GMP is ten percent (10%) or less. In this context, "increase" means an increase in quantity resulting from the addition of locations not within the scope of work approved by City Council, or the addition of types of goods or services not bid as unit price items.
- 7.1.3 DESIGN-BUILD CONTRACTOR shall proceed promptly to perform changes in the Work provided in Modifications, unless otherwise stated in the Modification.

# 7.2 WORK CHANGE DIRECTIVES

- 7.2.1 A Work Change Directive cannot change a CGMP, the GMP, or Contract Time, but is evidence that the Parties agree that a change, ordered by directive, will be incorporated in a subsequently issued Change Order as to its effect, if any, on a CGMP, the GMP, or Contract Time.
- 7.2.2 Failure by DESIGN-BUILD CONTRACTOR to commence work identified in a Work Change Directive within the time specified by Director, or to complete the work in a reasonable period of time, may be determined by Director to be a material breach of this Contract.
- 7.2.3 A Work Change Directive is used in the absence of total agreement of the terms of a Change Order. Interim payments are made in accordance with Article 9. DESIGN-BUILD

- CONTRACTOR may include a request for payment for undisputed Work under a Work Change Directive with Applications for Payment submitted in accordance with the Contract Documents.
- 7.2.4 If DESIGN-BUILD CONTRACTOR signs a Work Change Directive, then DESIGN-BUILD CONTRACTOR agrees to its terms including adjustment in a CGMP or the GMP (as applicable) and Contract Time or method for determining them. Agreement by the Parties to adjustments in a CGMP or the GMP (as applicable) and Contract Time shall be recorded as a Change Order.
- 7.2.5 Director, by Work Change Directive, may direct DESIGN-BUILD CONTRACTOR to take measures as necessary to expedite construction to achieve Date of Substantial Completion on or before expiration of Contract Time. When the Work is expedited solely for convenience of the City and not due to DESIGN-BUILD CONTRACTOR's failure to prosecute timely completion of the Work, then DESIGN-BUILD CONTRACTOR is entitled to an adjustment in the GMP equal to actual costs determined in accordance with Article

# 7.3 ADJUSTMENTS IN A CGMP OR THE GMP

- 7.3.1 Adjustments in a CGMP or the GMP shall be accomplished only by Change Order and are based on one of the following methods:
  - 7.3.1.1 mutual acceptance of pricing, properly itemized and supported by sufficient data to permit evaluation in which to determine an adjustment to a CGMP or the GMP;
  - 7.3.1.2 unit prices stated in the Contract or subsequently agreed upon;
  - 7.3.1.3 cost to be determined in a manner agreed upon by the Parties and mutually acceptable fixed or percentage fee; or
  - 7.3.1.4 as provided in Paragraph 7.3.2.
- 7.3.2 If DESIGN-BUILD CONTRACTOR does not agree with a change in a CGMP, the GMP, or Contract Time or the method for adjusting the same, as specified in connection with a Work Change Directive, within twenty-one (21) days from date of the Work Change Directive's issuance, DESIGN-BUILD CONTRACTOR may file a Claim in accordance with Paragraph 4.4. Otherwise, the Director's determination shall be deemed accepted by DESIGN-BUILD CONTRACTOR.
  - 7.3.2.1 If Director determines a method and adjustment in a CGMP or the GMP under Paragraph 7.3.2, DESIGN-BUILD CONTRACTOR shall provide, in a form as Director may prescribe, appropriate supporting data for items submitted under Paragraph 7.3.2. Failure to submit the data within twenty-one (21) days of request for the data by Director shall constitute waiver of a Claim.
  - 7.3.2.2 Unless otherwise provided in the Contract, costs for the purposes of this Paragraph 7.3.2 are limited to the following:
    - 7.3.2.2.1 costs of labor, including labor burden as stated below for social security, unemployment insurance, customary and usual fringe benefits required by agreement or custom, and Workers' Compensation insurance;
      - 7.3.2.2.1.1 the maximum labor burden applied to costs of labor for changes in the Work is specified in the Contract.

- 7.3.2.2.1.2 Labor rates included in DESIGN-BUILD CONTRACTOR's and its subcontractors' proposals shall be substantiated with backup information showing the complete makeup of the rates.
- 7.3.2.2.2 costs of materials, supplies, and equipment, including cost of transportation, whether incorporated or consumed;
- 7.3.2.2.3 reasonable rental costs of machinery and equipment, exclusive of hand tools, whether rented from DESIGN-BUILD CONTRACTOR or others, with prior approval of Director;
- 7.3.2.2.4 costs of premiums for Bonds and insurance and permit fees related to the change in the Work
- 7.3.2.2.5 additional costs of field supervision of the Work, to the extent that the supervision is a direct addition to the Cost of the Work; and
- 7.3.2.2.6 allowances for overhead and profit as stated below.
  - 7.3.2.2.6.1 the maximum allowances for overhead and profit on increases due to Change Orders set out in the table in this Paragraph.

	Overhead	Profit
to DESIGN-BUILD CONTRACTOR for change in the Work performed by Subcontractors:	DESIGN-BUILD CONTRACTOR Stipulated Fee %.	
to first tier Subcontractors for change in the Work performed by its Subcontractors:	10 percent	0 percent
to DESIGN-BUILD CONTRACTOR and Subcontractor for change in the Work performed by their respective firms:	10 percent	5 percent

- 7.3.2.2.6.2 Overhead and Profit: The DESIGN-BUILD CONTRACTOR's and Subcontractors' overhead and profit percentages shall be considered to include, among other costs; change order processing costs including without limitation project management, estimating, clerical and drafting costs performed by field operations or in the home office, relating to change in the Work; field supervision not directly added to the cost of change in the Work; incidental job burdens; cost of idle equipment; home office overhead and consequential damages; general home office expenses; profit; and loss of profit.
- 7.3.2.2.6.3 for changes in the Work performed by DESIGN-BUILD CONTRACTOR and its Subcontractors, allowance for overhead is applied to an amount equal to all increases in the Cost of the Work. Allowance for profit is applied to the net Cost of the Work whether the cost is an increase or decrease. Allowance for overhead to DESIGN-BUILD

CONTRACTOR and first tier Subcontractors on changes performed by lower tier Subcontractors are applied to all increases in the Cost of the Work by applicable Subcontractors.

- 7.3.3 If the City deletes or makes a change, which results in a net decrease in a CGMP or the GMP, the City is entitled to a credit calculated in accordance with Paragraphs 7.3.1 and 7.3.2 and Subparagraphs 7.3.2.1, and 7.3.2.2.1 through 7.3.2.2.5.
- 7.3.4 When DESIGN-BUILD CONTRACTOR agrees with the determination made by Director concerning adjustments in GMP and Contract Time, or the Parties otherwise reach agreement upon the adjustments, the agreement will be recorded by Change Order.
- 7.3.5 Adjustments in a CGMP, the GMP or Contract Time shall be accomplished only by Change Order after the Parties have agreed to amending the approved CGMP or GMP Submittal, as applicable.
- 7.3.6 If the Director deletes or makes a change which results in a net decrease in a CGMP or the GMP, City is entitled to a credit by DESIGN-BUILD CONTRACTOR in a CGMP or the GMP (as applicable) and the Cost of the Work.

# 7.4 MINOR CHANGES IN THE WORK

7.4.1 A Minor Change in Work is binding on the Parties. DESIGN-BUILD CONTRACTOR shall acknowledge, in a written form acceptable to Director, that there is no change in a CGMP, the GMP, or Contract Time and shall carry out the written orders promptly.

## 7.5 CHANGES IN APPLICABLE LAW

7.5.1 To the extent that a change in Applicable Law enacted after a CGMP or the GMP is agreed upon affects to a material extent DESIGN-BUILD CONTRACTOR's time or cost of performing the Work for the affected phase of Construction, DESIGN-BUILD CONTRACTOR shall give Director written notice within ninety-one (91) Days of the effective date of such a change in Applicable Law, setting forth the details of the change in Applicable Law and DESIGN-BUILD CONTRACTOR's good faith determination of its impact on DESIGN-BUILD CONTRACTOR's performance obligations under the Contract Documents. The Director will investigate such change in Applicable Law and, if the Director determines that it causes an increase or decrease in DESIGN-BUILD CONTRACTOR's cost of, or time required for, performance of the Work for the affected phase of Construction and that the notice was given timely, City and DESIGN-BUILD CONTRACTOR shall enter into a Change Order in accordance with the provisions of Article 7 herein.

## **ARTICLE 8 - TIME**

# 8.1 PROGRESS AND COMPLETION

- 8.1.1 By executing a CGMP or the GMP Submittal and any CGMP/GMP contract amendment or Change Order, as determined by the City, DESIGN-BUILD CONTRACTOR agrees that Contract Time is a reasonable period for performing the Work.
- 8.1.2 Computation of Time: In computing any period of time prescribed or allowed by the Document 00700-General Conditions, the day of the act, event, or default after which designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or Legal Holiday, in which event the period runs until end of the next day that is not a Sunday or Legal Holiday. Sundays and

Legal Holidays are considered to be days and are to be included in all other time computations relative to Contract Time.

- 8.1.2.1 DESIGN-BUILD CONTRACTOR shall provide Director an accounting of inclement weather delay days within thirty (30) days of their occurrences.
- 8.1.2.2 Director may grant an extension of Contract Time due to inclement weather where the DESIGN-BUILD CONTRACTOR establishes an actual delay impacting the critical path of the construction schedule and otherwise complies with the requirements of Article 8 when the inclement weather is the sole cause of the delay.
- 8.1.3 DESIGN-BUILD CONTRACTOR may not commence the Work prior to the effective date of insurance and Bonds required by Article 11.
- 8.1.4 DESIGN-BUILD CONTRACTOR shall proceed expeditiously and without interruption, with adequate forces, and shall achieve Date of Substantial Completion within the Contract Time without additional cost to the City.
- 8.1.5 Should progress of the Work fall behind construction schedule, except for reasons stated in Paragraph 8.2.1, DESIGN-BUILD CONTRACTOR shall promptly submit at the request of Director, updated construction schedule to Director for approval. DESIGN-BUILD CONTRACTOR's failure to submit updated schedule may, at Director's discretion, constitute a material breach of the Contract. DESIGN-BUILD CONTRACTOR shall take action necessary to restore progress by working the hours, including night shifts and lawful overtime operations as necessary, to achieve Date of Substantial Completion within the Contract Time without additional cost to the City.
- 8.1.6 DESIGN-BUILD CONTRACTOR must have an approved work-hours plan prior to commencing work on the Project site. Changes to the approved work-hours plan shall require 48-hour written notice and subsequent written approval by the Director.

## 8.2 DELAYS AND EXTENSIONS OF TIME

- 8.2.1 DESIGN-BUILD CONTRACTOR may request extension of Contract Time for a delay in performance of work that arises from causes beyond DESIGN-BUILD CONTRACTOR's control and without fault or negligence of DESIGN-BUILD CONTRACTOR. Examples of these causes are:
  - 8.2.1.1 acts of God or of the public enemy,
  - 8.2.1.2 acts of government in its sovereign capacity, except for acts of the City
  - 8.2.1.3 fires,
  - 8.2.1.4 floods,
  - 8.2.1.5 epidemics,
  - 8.2.1.6 quarantine restrictions,
  - 8.2.1.7 strikes,
  - 8.2.1.8 freight embargoes,

- 8.2.1.9 unusually severe weather (subject to Paragraph 8.1.2.2); and
- 8.2.1.10discovery of Pollutants or Pollutant Facilities at the site.
- 8.2.2 For any reason other than those listed in Paragraph 4.3.6.1, if the DESIGN-BUILD CONTRACTOR's work is delayed in any manner or respect, the DESIGN-BUILD CONTRACTOR shall have no claim for damages and shall have no right of additional compensation from the City by reason of any delay or increased expense to the DESIGN-BUILD CONTRACTOR's work, except for an extension of time as provided in this provision.
- 8.2.3 DESIGN-BUILD CONTRACTOR may request and may be entitled to an extension of Contract Time for delay only if:
  - 8.2.3.1 delay is not caused by failure of DESIGN-BUILD CONTRACTOR or any of its Subcontractors or Suppliers to perform (or cause to be performed) or make progress for a cause not within its control; and
  - 8.2.3.2 cause of the delay was not reasonably anticipated and is beyond control of DESIGN-BUILD CONTRACTOR; and
  - 8.2.3.3 the delay has been mitigated by all reasonably available efforts; and
  - 8.2.3.4 DESIGN-BUILD CONTRACTOR can fully document and prove the impact of the event on DESIGN-BUILD CONTRACTOR's critical path of planned Work in the Project Schedule.
- 8.2.4 Claims relating to Contract Time must be made in accordance with Paragraph 4.3.7.
- 8.2.5 Claims for extending or shortening Contract Time are based on written notice promptly delivered by DESIGN-BUILD CONTRACTOR to Director. A Claim must accurately describe occurrence generating the Claim, and a statement of probable effect on progress of the Work.
- 8.2.6 Claims for extension of Contract Time are considered only when a Claim is filed within the time limits stated in Paragraph 4.3.3.
  - 8.2.6.1. Notwithstanding Paragraph 4.3.3, an extension of time for delays under this paragraph may be granted only upon prompt written application by the DESIGN-BUILD CONTRACTOR, not to exceed within seven (7) days from the claimed delay.
- 8.2.7 Written notice of a Claim must be accompanied by claimant's written statement that adjustment claimed is entire adjustment to which claimant is entitled as a result of the occurrence of the event. When the Parties cannot agree, Claims for adjustment in Contract Time are determined by Director in accordance with Paragraph 4.4.
- 8.2.8 Adjustments to Contract Time shall be accomplished only by Change Order.

#### **ARTICLE 9 - PAYMENTS AND COMPLETION**

## 9.1 APPLICATION FOR PAYMENT

- Ten (10) days before submittal of the first Application for Payment for a phase of Construction, DESIGN-BUILD CONTRACTOR shall submit to Director a Schedule of Values accurately allocating a CGMP or the GMP to the various portions of the Work, prepared in the form and supported by the data as Director may require to substantiate its accuracy. The Schedule of Values shall contain, at a minimum, separate line items for the close out of the Work for the phase of Construction, the delivery of record "as-built" drawings, delivery of operation and maintenance manuals, delivery of warranty documents, and final cleanup. The Schedule of Values shall be balanced and not contain any "front end loading." The Schedule of Values, as approved by Director, shall be used as a basis for approval of DESIGN-BUILD CONTRACTOR's Applications for Payment. In addition, DESIGN-BUILD CONTRACTOR shall submit the process and basis for calculating the earned value measurement for each schedule of value, including quantities and rules of credit, as applicable. At the direction of the Director, the Schedule of Values shall be grouped along the lines of specific equipment, asset or deliverable produced as a result of the work performed. In addition to the required hard copies of the Application for Payment and supporting documentation, DESIGN-BUILD CONTRACTOR shall, as directed by the Director, submit Applications for Payment electronically into the HAS's project management system including electronic uploading of supporting documentation. Access to the project management system and required training will be coordinated through the Director.
- 9.1.2 DESIGN-BUILD CONTRACTOR shall submit Applications for Payment to Director each month on a form acceptable to Director in accordance with Schedule of Values. Each Application for Payment shall indicate percentages of completion of each portion of the Work listed in Schedule of Values as of the end of the period covered by the Application for Payment. Each Application for Payment shall include calculations to support the reported percentage complete. The period covered by each Application for Payment shall be one calendar month ending on the last Friday of the month. The value for any line item in the approved Schedule of Values shall not be modified without prior written approval of the Director.
- 9.1.3 Each Schedule of Values submitted with an Application for Payment shall include the originally established value for each Work classification line item or subcontract and shall identify, by the addition of new data rows immediately below the previously accepted data rows, any revisions to the costs or cost estimates for each Work classification or subcontract. The format and tracking method of the original Schedule of Values and of all updates shall be subject to approval by Director. At all times, the estimated cost of performing the uncompleted and unpaid portion of the Work, including DESIGN-BUILD CONTRACTOR's Fee, shall not exceed the unpaid balance of a CGMP or the GMP (as applicable), less retainage on Work previously completed.
- 9.1.4 If previously unpaid, the Preconstruction Services costs shall be identified separately in each Application for Payment.
- 9.1.5 DESIGN-BUILD CONTRACTOR shall deliver to Director three (3) copies of each itemized Application for Payment in such detail as is required by Director. Applications for Payment must be supported by such substantiating data as Director may require and shall reflect retainages as provided in the Contract Documents. The Application for Payment must be sworn to and notarized. In addition to the required hard copies of the Application for Payment and supporting documentation, DESIGN-BUILD CONTRACTOR shall, as directed by the Director, submit Applications for Payment electronically into the City's web-

based collaboration tool, including electronic uploading of supporting documentation. Submit electronic version in Microsoft Excel native format of preliminary Schedule of Values within twenty-one (21) days of Notice to Proceed for Preconstruction Services. Submit electronic copy with each Application for Payment. Obtain approval before making first application for payment.

- 9.1.6 Before submitting the next Application for Payment (and with the Application for Final Payment), DESIGN-BUILD CONTRACTOR shall submit any evidence required by Director to verify the Cost of the Work and to demonstrate that the cash disbursements already made by DESIGN-BUILD CONTRACTOR on account of the Cost of the Work are equal to or exceed (1) progress payments already received by DESIGN-BUILD CONTRACTOR; less (2) that portion of those payments attributable to DESIGN-BUILD CONTRACTOR's Fee; plus (3) payrolls for the period covered by the most recent Application for Payment; less (4) retainage provided for in the Contract Documents applicable to prior progress payments. This documentation of the most recent Application for Payment, if required by Director, shall have a summary sheet (in two copies) that descriptively itemizes all expenses and individuals. No payment is required to be made for Work for which DESIGN-BUILD CONTRACTOR fails to provide required documentation.
- 9.1.7 Each Application for Payment shall be based upon the Cost of the Work and the most recent Schedule of Values submitted by DESIGN-BUILD CONTRACTOR in accordance with the Contract Documents and accepted by Director.
- 9.1.8 Applications for Payment shall show the Cost of the Work actually incurred by DESIGN-BUILD CONTRACTOR through the end of the period covered by the Application for Payment and for which DESIGN-BUILD CONTRACTOR has made or intends to make actual payment prior to the next Application for Payment and the percentage completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage completion shall be the lesser of (1) the percentage of that portion of the Work that has actually been completed or (2) the percentage obtained by dividing (a) the Cost of the Work that has actually been incurred by DESIGN-BUILD CONTRACTOR on account of that portion of the Work for which DESIGN-BUILD CONTRACTOR has made or intends to make actual payment prior to the next Application for Payment by (b) the share of a CGMP or the GMP (as applicable) allocated to that portion of the Work in the Schedule of Values.
  - 9.1.8.1 The Director, at his sole discretion, may authorize payment of stored materials up to a value of eighty five percent (85%), subject to applicable retainage, of the actual invoice amount properly substantiated by certified copies of invoices and freight bills of non-perishable material and equipment delivered and properly stored. DESIGN-BUILD CONTRACTOR must obtain approval from Director for authorization to bill for stored materials in advance of the request for payment. Properly stored materials shall be only those materials suitably stored at the Project site unless otherwise agreed to by the Director in writing.
- 9.1.9 Each Application for Payment, including the Application for Final Payment, shall constitute a certification by DESIGN-BUILD CONTRACTOR to City that the Work has progressed to the point indicated and the Work represented has actually been performed; the quality of the Work covered in the Application for Payment is in accordance with the Contract Documents; DESIGN-BUILD CONTRACTOR is entitled to payment in the amount requested; DESIGN-BUILD CONTRACTOR remains capable of performing the Contract to completion; and DESIGN-BUILD CONTRACTOR is current in payment with Subcontractors and Suppliers.

- 9.1.10 DESIGN-BUILD CONTRACTOR shall promptly and in all events before interest charges accrue to the Subcontractor pay each of its Subcontractors, upon receipt of payment from City, out of the amount paid to DESIGN-BUILD CONTRACTOR on account of such Subcontractor's work, the amount to which such Subcontractor is entitled in accordance with the terms of DESIGN-BUILD CONTRACTOR's Subcontract with such Subcontractor. DESIGN-BUILD CONTRACTOR shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its sub-subcontractors in similar manner. City shall have no obligation to pay or to be responsible in any way for payment to any Subcontractor or Supplier.
- 9.1.11 With each Application for Payment, DESIGN-BUILD CONTRACTOR shall submit a certified "waiver and release." The waiver and release shall state: "In consideration for the payment received, DESIGN-BUILD CONTRACTOR waives all claims of every sort against City arising out of the Work performed through the effective date of the Application for Payment, except for retainage and such claims as have been properly submitted in accordance with the provisions of the Contract Documents or claims that can be made timely within the requirements of the Contract Documents."
- 9.1.12 Retainage shall be five percent (5%) of the Cost of the Work and the DESIGN-BUILD CONTRACTOR's Fee for each Phase of the Work. There shall be no retainage on the DESIGN-BUILD CONTRACTOR's building permit cost, bond and insurance cost. Otherwise, the City shall be entitled to withhold retainage from all Applications for Payment by DESIGN-BUILD CONTRACTOR. Retainage is not held by City for the benefit of any others and shall be deemed amounts not yet earned by or owed to DESIGN-BUILD CONTRACTOR.
- 9.1.13 In addition to other rights under the Contract Documents and Applicable Law, Director, in its discretion, may retain amounts owing to DESIGN-BUILD CONTRACTOR as City deems appropriate to protect City's interest. DESIGN-BUILD CONTRACTOR shall not receive payments from City for any amounts DESIGN-BUILD CONTRACTOR retains from its Subcontractors, and DESIGN-BUILD CONTRACTOR shall immediately return to City any amounts paid to DESIGN-BUILD CONTRACTOR on behalf of any Subcontractor or Supplier or other which DESIGN-BUILD CONTRACTOR does not pass on as payment before the next Application for Payment. In the event City withholds all or any portion of the DESIGN-BUILD CONTRACTOR's payments under this paragraph or under 9.4 hereof, City shall provide specific written accounting for same and shall allocate specific amounts for each reason justifying withholding. Such explanation shall be provided at the time payments would otherwise be due and sums withheld shall be paid when each such reason for withholding same has been cured to the reasonable satisfaction of the City.
- 9.1.14 Materials and services utilized in the construction of the Project may be exempted from state and local taxes. DESIGN-BUILD CONTRACTOR is responsible for taking full advantage of all tax exemptions applicable to the Project. City will deduct from the Applications for Payment and from the Request for Final Payment any taxes paid for materials or services that were entitled to tax exemption.
- 9.1.15 The DESIGN-BUILD CONTRACTOR is subject to the assessment of liquidated damages as provided in the Contract Documents. Amounts assessed as liquidated damages, and other amounts to which City is entitled by way of setoff or recovery, may be deducted from any monies otherwise due DESIGN-BUILD CONTRACTOR.
- 9.1.16 DESIGN-BUILD CONTRACTOR's records shall be kept on the basis of generally accepted accounting principles in accordance with cost accounting standards issued by the Federal Office of Management and Budget Cost Accounting Standards Board consistently applied and organized by each Application for Payment period.

9.1.17 Applications for Payment must be supported by substantiating back-up data as required by the Director and must reflect retainages as required herein. Evidence satisfactory to the Director of payments made to Subcontractors and Suppliers for the month preceding the month for which the Application for Payment is submitted must accompany each Application for Payment on a form approved by the Director of the City's Office of Business Opportunity. The Application must be sworn and notarized.

# 9.2 CERTIFICATES FOR PAYMENT

- 9.2.1 Prior to issuing each Application for Payment under Paragraph 9.1, DESIGN-BUILD CONTRACTOR shall submit a "Draft" Application for Payment that is valid and has all required documentation no later than the 25<sup>th</sup> of the same month with Work projected through the end of the month. Within five (5) days of receipt of the Draft, the Director shall review the Draft and provide the DESIGN-BUILD CONTRACTOR with any adjustments to the progress of the Work or amount requested, within reason. The DESIGN-BUILD CONTRACTOR shall make agreed to corrections to the Draft and submit to the City a "Final" Application for Payment that is valid and has all required documentation within five (5) days from receipt of the Director's adjustments. Upon receipt of the Final Application for Payment, the City shall make payment to the DESIGN-BUILD CONTRACTOR not later than thirty (30) days from receipt. If, and in the event, the Director holds all or part of a Final Application for Payment for one or more reasons, the Director will issue a written explanation apportioning the amount withheld to each such cause.
  - 9.2.1.1 With its draft Application for Payment, DESIGN-BUILD CONTRACTOR shall submit to Director on a form approved by the Director of Mayor's Office of Business Opportunity, evidence satisfactory to the Director of payments made to Subcontractors and Suppliers for the month preceding the month for which the Application for Payment is prepared.
- 9.2.2 Unless otherwise provided in the Contract Documents, payment for completed Work and for properly stored Products is conditioned upon compliance with procedures satisfactory to and agreed to by Director to protect City's interests. Procedures will include applicable insurance, storage, and transportation to the site (with suitable on site storage and protection) for Products stored off site and proper documentation for such delivered Products, including certified copies of invoices and freight bills. DESIGN-BUILD CONTRACTOR is responsible for maintaining materials and equipment until the Date of Substantial Completion.
- 9.2.3 DESIGN-BUILD CONTRACTOR shall document its use of Low Sulfur Diesel Fuel by providing invoices and receipts evidencing DESIGN-BUILD CONTRACTOR's use.

## 9.3 COMPUTATIONS OF CERTIFICATES FOR PAYMENT

- 9.3.1 Subject to the provisions of the Contract Documents, the amount of each Certificate for Payment is calculated as follows:
  - 9.3.1.1 Take that portion of the a CGMP or the GMP properly allocated to completed Work for such phase of Construction based upon the percentage completion of each portion of the Work as set forth above. Pending final determination of cost to City of changes in the Work, amounts not in dispute may be included after increases and decreases have been netted out against each other, even though a CGMP or the GMP (as applicable) has not yet been adjusted by Change Order.
  - 9.3.1.2 Add the DESIGN-BUILD CONTRACTOR's Fee.

- 9.3.1.3 Subtract the amount of retainage and such other amounts as City is entitled to withhold.
- 9.3.1.4 Subtract the aggregate of the previous payments made by City.
- 9.3.1.5 Subtract the shortfall, if any, indicated by DESIGN-BUILD CONTRACTOR in the documentation required to substantiate prior Applications for Payment or DESIGN-BUILD CONTRACTOR's payment of Costs of the Work covered by pervious payments, or resulting from errors subsequently discovered by Director in such documentation.
- 9.3.1.6 Subtract amounts, if any, for which City has withheld or nullified an Application for Payment.

# 9.4 DECISIONS TO WITHHOLD CERTIFICATION

- 9.4.1 Director may decline to issue a Certificate for Payment and may withhold payment in whole or in part to the extent reasonably necessary to protect City if, in Director's opinion, there is reason to believe that:
  - 9.4.1.1 nonconforming work has not been remedied;
  - 9.4.1.2 the Work cannot be completed for unpaid balance of a CGMP or the GMP;
  - 9.4.1.3 there is damage to City or another Contractor;
  - 9.4.1.4 DESIGN-BUILD CONTRACTOR has persistently failed to complete the Work in accordance with the Project Schedule or the Work will not be completed within Contract Time and that unpaid balance will not be adequate to cover actual and liquidated damages;
  - 9.4.1.5 evidence that third party claims will probably be filed in court, in arbitration, or otherwise;
  - 9.4.1.6 DESIGN-BUILD CONTRACTOR has failed to make payments to Subcontractors or Suppliers or other third parties related to the Work;
  - 9.4.1.7 DESIGN-BUILD CONTRACTOR has failed to carry out the Work in accordance with the Contract Documents;
  - 9.4.1.8 The payment request has insufficient documentation to support the amount of payment requested;
  - 9.4.1.9 DESIGN-BUILD CONTRACTOR fails to obtain, maintain or renew insurance coverage as required by the Contract Documents;
  - 9.4.1.10 DESIGN-BUILD CONTRACTOR is in breach or default under the Contract Documents or any loss or damage may result from negligence by DESIGN-BUILD CONTRACTOR or any Subcontractor or failure of DESIGN-BUILD CONTRACTOR or any Subcontractor to perform their obligations under the Contract Documents.
  - 9.4.1.11 DESIGN-BUILD CONTRACTOR has not paid Subcontractors or Suppliers because of a payment dispute limited to only that portion of DESIGN-BUILD CONTRACTOR's payment related to said payment dispute:

- 9.4.1.12 DESIGN-BUILD CONTRACTOR has failed to provide satisfactory evidence described in Paragraphs 9.1.16 and 9.2.1.1; or
- 9.4.1.13 A determination that any amounts previously paid were the proper subject of a withholding hereunder.
- 9.4.2 When the above reasons for withholding a Certificate for Payment are removed, certification will be made for amounts previously withheld.
- 9.4.3 Director may decline to issue a Certificate for Payment and may withhold request for payment in whole or in part upon failure of DESIGN-BUILD CONTRACTOR to submit initial construction schedule or monthly schedule updates, as required in Paragraph 3.15 or elsewhere in the Contract Documents.
- 9.4.4 City shall at any time during regular business hours have the right to inspect and copy the books and records (however kept) of DESIGN-BUILD CONTRACTOR for verification of Work done, costs, bids, estimates, markups, payments due, amounts claimed, obligations owed Subcontractors or Suppliers, or any other aspect of DESIGN-BUILD CONTRACTOR's obligations as they relate to the Project. At Director's request, DESIGN-BUILD CONTRACTOR, shall promptly provide evidence satisfactory to City of DESIGN-BUILD CONTRACTOR's compliance with the Contract Documents. DESIGN-BUILD CONTRACTOR shall require its Subcontractors and Suppliers to comply with this Paragraph, and similarly require their sub-subcontractors and Suppliers of any tier, to comply with this Paragraph.
- 9.5. *[OMITTED]*
- 9.6. *[OMITTED]*
- 9.7. *[OMITTED]*

#### 9.8 PROGRESS PAYMENTS

- 9.8.1 The City will make payment, in an amount certified by Director, within thirty (30) days after Director has issued a Certificate for Payment.
- 9.8.2 The City has no obligation to pay or to facilitate the payment to a Subcontractor or a Supplier except as may otherwise be required by law. DESIGN-BUILD CONTRACTOR shall comply with the prompt payment requirements of Chapter 2251 of the Government Code. However, DESIGN-BUILD CONTRACTOR shall pay Subcontractors and Suppliers within seven (7) calendar days of DESIGN-BUILD CONTRACTOR's receipt of payment from the City unless there is a payment dispute between DESIGN-BUILD CONTRACTOR and a Subcontractor or Supplier evidenced on a form approved by the Director of the City's Office of Business Opportunity and submitted to the Director each month with its Application for Payment or Estimate for Payment. DESIGN-BUILD CONTRACTOR SHALL DEFEND AND INDEMNIFY THE CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF DESIGN-BUILD CONTRACTOR'S FAILURE TO MAKE THESE PAYMENTS.
  - 9.8.2.1 The City may, upon request and at the discretion of Director, furnish to Subcontractor information regarding percentages of completion or the amounts applied for by DESIGN-BUILD CONTRACTOR, and action taken thereon by the City because of Work done by the Subcontractor.

- 9.8.2.2 DESIGN-BUILD CONTRACTOR shall prepare and submit to Director a Certification of Payment to Subcontractors, Suppliers, persons and entities form to be attached to each monthly Application for Payment.
- 9.8.3 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Work by City, does not constitute acceptance of work that is not in accordance with the Contract.

## 9.9 DATE OF SUBSTANTIAL COMPLETION

- 9.9.1 The Date of Substantial Completion of the Work is the date the City determines construction is sufficiently complete, in accordance with the Contract Documents, so the City may occupy or use the Work, or designated portion thereof, for its intended purpose, without restriction. Substantial Completion date(s), if any, are specified elsewhere in the Contract Documents.
  - 9.9.1.1 When DESIGN-BUILD CONTRACTOR considers the Work, or a portion thereof designated by Director, to be substantially complete, DESIGN-BUILD CONTRACTOR shall prepare and submit to Director a comprehensive Punch List of items to be completed or corrected. Failure to include an item on the Punch List does not alter the responsibility of DESIGN-BUILD CONTRACTOR to comply with the Contract Documents.
  - 9.9.1.2 By submitting the Punch List to Director, DESIGN-BUILD CONTRACTOR represents that work on the Punch List will be completed within the time provided for in Subparagraph 9.9.4.3.
- 9.9.2 Upon receipt of DESIGN-BUILD CONTRACTOR's Punch List, Director will inspect the Work, or designated portion thereof, to verify that the Punch List contains all items needing completion or correction. If Director's inspection discloses items not on DESIGN-BUILD CONTRACTOR's Punch List, the items must be added to the Punch List of items to be completed or corrected. If Director's inspection reveals that DESIGN-BUILD CONTRACTOR is not yet substantially complete, DESIGN-BUILD CONTRACTOR shall complete or correct the deficiencies and request another inspection by Director. The City may recover the costs of re-inspection from DESIGN-BUILD CONTRACTOR. Director will use reasonable efforts to inspect the phase of Construction within a reasonable time following receipt of DESIGN-BUILD CONTRACTOR's Punch List, and if the Director disagrees that Substantial Completion has been achieved, the Director will provide written notice as to what remains before Substantial Completion is achieved (but the Director shall not be prohibited from identifying other deficiencies later).
- 9.9.3 Prior to Director's issuing a Certificate of Substantial Completion for the Work or portion of the Work designated by the Director, DESIGN-BUILD CONTRACTOR shall also provide the Director:
  - 9.9.3.1 Certificate of Occupancy (a temporary Certificate of Occupancy is acceptable provided DESIGN-BUILD CONTRACTOR promptly and diligently proceeds to obtain a permanent Certificate of Occupancy without conditions) for new construction, or Certificate of Compliance for remodeled work, as applicable; and
  - 9.9.3.2 compliance with Texas Accessibility Standards through state inspection of the Work, if required. If DESIGN-BUILD CONTRACTOR calls for inspection in a timely manner and the inspection is delayed through no fault of DESIGN-BUILD CONTRACTOR, and Director so confirms, Director may, upon request by

DESIGN-BUILD CONTRACTOR, add the inspection to the Punch List in Paragraph 9.9.2 and issue a Certificate of Substantial Completion.

- 9.9.4 When the Work, or designated portion thereof, is determined by Director to be sufficiently complete in accordance with the Contract Documents so the City can occupy or utilize the Work, or designated portion thereof, for the purpose for which it is intended, and all other conditions and requirements are satisfied, Director will prepare a Certificate of Substantial Completion that incorporates the Punch List in Paragraph 9.9.2 and establishes:
  - 9.9.4.1 Date of Substantial Completion;
  - 9.9.4.2 responsibilities of the Parties for security, maintenance, heating, ventilating and air conditioning, utilities, damage to the Work, and insurance; and
  - 9.9.4.3 fixed time within which DESIGN-BUILD CONTRACTOR shall complete all items on Punch List to be corrected or completed accompanying the certificate.
- 9.9.5 After the Date of Substantial Completion of a phase of Construction and upon application by DESIGN-BUILD CONTRACTOR and approval by Director, City may make payment, reflecting adjustment in retainage, if any, as follows: with the consent of Surety, the City, in the sole discretion of the Director, may increase payment to DESIGN-BUILD CONTRACTOR up to ninety-seven and one-half percent (97.5%) of a CGMP or the GMP (as applicable), less the value of items to be completed and accrued liquidated damages. In addition, before Substantial Completion, with the consent of Surety and in the sole discretion of the Director, the City may release retainage attributable to early performing Subcontractors or small businesses, to the extent and provided the DESIGN-BUILD CONTRACTOR submits proof such sums have been actually paid to such Subcontractors and small businesses.
- 9.9.6 DESIGN-BUILD CONTRACTOR shall complete or correct the items in the Punch List in Paragraph 9.9.2 within the time period set out in the Certificate of Substantial Completion. If DESIGN-BUILD CONTRACTOR fails to do so, the City may issue a Notice of Non-Compliance and proceed in accordance with Paragraph 2.5.
- 9.9.7 DESIGN-BUILD CONTRACTOR shall keep the premises free from accumulation of waste materials or rubbish caused by DESIGN-BUILD CONTRACTOR's operations. At the completion of the Work, DESIGN-BUILD CONTRACTOR shall remove from and about the DESIGN-BUILD CONTRACTOR's tools, construction equipment, machinery, surplus materials, waste materials and rubbish.
- 9.9.8 Immediately prior to the review of a portion of the Work for Substantial Completion, DESIGN-BUILD CONTRACTOR shall remove all waste materials, rubbish, DESIGN-BUILD CONTRACTOR's tools, construction equipment, machinery and surplus materials from the area to be inspected. DESIGN-BUILD CONTRACTOR shall also remove all protective coatings, temporary work, barriers and other protective devices.
  - 9.9.8.1 Finished spaces that are to be inspected shall be cleaned as required to remove all stains, dirt and dust. Glass shall be cleaned on both faces, and carpet shall be vacuumed.
  - 9.9.8.2 Unfinished spaces such as mechanical and electrical equipment rooms that are to be inspected shall be "broom clean."

- 9.9.8.3 Mechanical work such as duct work, unit heaters, finned tube radiation and its covers, air conditioning units, grilles and registers shall be cleaned as required to remove all stains, dirt and dust.
- 9.9.8.4 Electrical work shall be cleaned as necessary to remove all stains, dirt and dust.
- 9.9.9 DESIGN-BUILD CONTRACTOR shall maintain the Work in a clean condition until City determines the Date of Substantial Completion for the Construction Phase. After the Date of Substantial Completion of the Construction Phase, DESIGN-BUILD CONTRACTOR is responsible for removing waste materials, rubbish, dirt and dust caused by its continued operations.
- 9.9.10 Prior to final acceptance, or prior to City's partial or complete occupancy of a portion of the Work, DESIGN-BUILD CONTRACTOR shall do the following: (1) clean all spaces of the Work so that they are ready for City's occupancy without additional cleaning; (2) remove from the Project site all temporary buildings of facilities for that Work unless needed for other portions of the Work; (3) replace filters in air handling equipment according to the Specifications; and (4) replace burned out lamps. This obligation is in addition to and not by way of limitation of DESIGN-BUILD CONTRACTOR's obligation to prove the Project is complete and ready to use in all respects by the time limits set forth in the Contract Documents.

## 9.10 PARTIAL OCCUPANCY OR USE

- 9. 10.1 The City may occupy or use any completed or partially completed portion of the Work at any stage, provided the occupancy or use is consented to by DESIGN-BUILD CONTRACTOR and DESIGN-BUILD CONTRACTOR's insurer and authorized by public authorities having jurisdiction over the Work. Consent of DESIGN-BUILD CONTRACTOR to partial occupancy or use may not be unreasonably withheld.
- 9.10.2 Immediately prior to the partial occupancy or use, Director and DESIGN-BUILD CONTRACTOR shall jointly inspect the area to be occupied or portion of the Work to be used to determine and record condition of the Work.
- 9.10.3 Partial occupancy or use of a portion of the work does not constitute acceptance of Work not in compliance with requirements of the Contract Documents.

## 9.11 FINAL COMPLETION AND FINAL PAYMENT

- 9.11.1 DESIGN-BUILD CONTRACTOR shall review the Contract and inspect the Work prior to DESIGN-BUILD CONTRACTOR notification to Director that the Work is complete and ready for final inspection. DESIGN-BUILD CONTRACTOR shall submit an affidavit that the Work has been inspected and that the Work is complete in accordance with the requirements of the Contract Documents.
- 9.11.2 Director will make final inspection within fifteen (15) days after receipt of DESIGN-BUILD CONTRACTOR's written notice that the Work is ready for final inspection and acceptance. If Director finds the Work has been completed in accordance with the Contract, DESIGN-BUILD CONTRACTOR shall submit items set out in Paragraph 9.11.4 and a final Application for Payment. Within thirty (30) days of receipt of the items set out in Paragraph 9.11.4, the Director may perform an audit to determine the accuracy of DESIGN-BUILD CONTRACTOR's accounting of the Costs of the Work and the Final Application for Payment. The Director will, within ten (10) days thereafter, either notify the DESIGN-BUILD CONTRACTOR that the DESIGN-BUILD CONTRACTOR has not achieved Final Completion of a phase of Construction as provided in Paragraph 9.11.3 or

issue a Certificate of Final Completion stating that to the best of Director's knowledge, information, and belief, the Work has been completed in accordance with the Contract. If there is only one phase of Construction, the Director will recommend acceptance of the Work by City Council. If there is more than one phase of Construction, the Parties shall confer upon the issuance of each Certificate of Final Completion to determine whether it is appropriate to seek City Council acceptance of the Work and release of the remaining retainage held for the particular phase of Construction that is certified as complete. Failing mutual agreement of the Parties to seek City Council acceptance and release of the remaining retainage, City shall continue to hold the remaining retainage for the particular phase of Construction until such time as the Parties mutually agree to seek City Council acceptance and release of the remaining retainage for such phase of Construction.

- 9.11.3 Should Work be found not in compliance with requirements of the Contract Documents, Director will notify DESIGN-BUILD CONTRACTOR in writing of items of noncompliance. Upon inspection and acceptance of the corrections by Director, compliance with all procedures of Paragraph 9.11.2, and DESIGN-BUILD CONTRACTOR's submission of the items set out in Paragraph 9.11.4. The Director will issue Certificate of Final Completion to DESIGN-BUILD CONTRACTOR's as provided in Paragraph 9.11.2.
- 9.11.4 DESIGN-BUILD CONTRACTOR shall submit the following items to the Director before the Director will issue a Certificate of Final Completion:
  - 9.11.4.1 affidavit that payrolls, invoices for materials and equipment, and other indebtedness of DESIGN-BUILD CONTRACTOR connected with the Work, less amounts withheld by the City, have been paid or otherwise satisfied. If required by Director, DESIGN-BUILD CONTRACTOR shall submit further proof including waiver or release of lien or claims from Subcontractors or Suppliers of Products, (which may be conditioned upon City making payment to DESIGN-BUILD CONTRACTOR);
  - 9.11.4.2 certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect, will not be canceled or materially changed until at least thirty (30) days written notice has been given to the City;
  - 9.11.4.3 written statement that DESIGN-BUILD CONTRACTOR knows of no substantial reason that insurance will not be renewable to cover Correction Period required by the Contract Documents;
  - 9.11.4.4 consent of Surety to final payment;
  - 9.11.4.5 copies of record documents, maintenance manuals, tests, inspections, and approvals and deliver the required record documents that describe changes or deviations from the Contract Documents, which occurred during construction and that reflect the actual "as-built" conditions of the completed Work; and
  - 9.11.4.6 compliance with Texas Accessibility Standards through state inspection of the Work, if required.
- 9.11.5 Upon Director's issuance of a Certificate of Final Completion, DESIGN-BUILD CONTRACTOR may request an increase in payment to ninety-nine percent (99%) of all amounts earned and payable under this Contract, less accrued liquidated damages.

- 9.11.6 If DESIGN-BUILD CONTRACTOR fails to submit required items in Paragraph 9.11.4 within ten (10) days of Director's inspection of the Work under Paragraph 9.11.2 or Paragraph 9.11.3, Director may, but is not obligated to:
  - 9.11.6.1 deduct liquidated damages accrued from monies held;
  - 9.11.6.2 proceed to City Council for acceptance of the Work, minus some or all of the items DESIGN-BUILD CONTRACTOR fails to submit under Paragraph 9.11.4; and,
  - 9.11.6.3 upon acceptance by City Council of the portion of the Work completed, either make final payment as set out in Paragraph 9.11.8 or request that City Attorney interplead the balance due to DESIGN-BUILD CONTRACTOR under the Contract into the registry of a court of appropriate jurisdiction.
- 9.11.7 If final completion is materially delayed through no fault of DESIGN-BUILD CONTRACTOR, or by issuance of Change Orders affecting Date of Final Completion, and Director so confirms, the City may, upon application by DESIGN-BUILD CONTRACTOR and certification by Director, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted.
- 9.11.8 If remaining balance due for Work not corrected is less than retainage stipulated in the Contract, DESIGN-BUILD CONTRACTOR shall submit to Director written consent of Surety to payment of balance due for that portion of the Work fully completed and accepted, prior to certification of the payment. The payment is made under terms governing final payment, except that it does not constitute waiver of Claims.
- 9.11.9 The City will make final payment to DESIGN-BUILD CONTRACTOR within thirty (30) days after acceptance of the Work by City Council, subject to limitations, if any, as stated in the Contract Documents. City is entitled to deduct from any payment any amounts owed by DESIGN-BUILD CONTRACTOR to City, including accrued liquidated damages.
- 9.11.10 Acceptance of final payment by DESIGN-BUILD CONTRACTOR shall constitute a waiver of all Claims, whether known or unknown, by DESIGN-BUILD CONTRACTOR, except those previously made in writing and identified by DESIGN-BUILD CONTRACTOR as unsettled at time of final Application for Payment.
- 9.11.11 Warranties required by the Contract shall commence on the Date of Final Completion unless otherwise provided by Director in Certificate of Substantial Completion. Warranties shall not commence on items not yet completed as of the date of Substantial Completion, until such items are actually completed and accepted.

## 9.12 LIQUIDATED DAMAGES

- 9.12.1 Liquidated damages for late completion of the Work shall be assessed as set forth in the Contract.
- 9.12.2 DESIGN-BUILD CONTRACTOR shall pay the City an amount equal to \$1,200.00 per diesel operating vehicle or piece of motorized equipment per incident of high sulfur diesel fuel usage.

# 9.13 <u>DESIGN-BUILD CONTRACTOR'S CLEAN AIR INCENTIVE</u>

9.13.1 SPECIAL PROVISION: INCENTIVE FOR USING NONROAD DIESEL EQUIPMENT POWERED BY DIESEL ENGINES THAT MEET EPA TIER 1, 2, 3 STANDARDS, OR A

# TCEQ-APPROVED RETROFIT EQUIVALENT, IN HOUSTON NONATTAINMENT AREA.

9.13.2 PURPOSE, SCOPE AND DURATION. This special provision establishes the conditions for the incentive offered to persons performing construction under a City of Houston contract who use non-road equipment powered by diesel (compression-ignition) engines rated at 50 horsepower or above that meet certain exhaust emission standards. Incentive payments shall only be made for non-road equipment that is required and used on the Project site, as more fully described below. This special provision is intended to assist the Houston-Galveston-Brazoria region to attain compliance with the State Implementation Plan mandated under the Clean Air Act, 42 U.S.C. § 7401 et seq.

## 9.13.3 ELIGIBLE EQUIPMENT.

- 9.13.3.1 For purposes of this special provision, "Non-road Diesel Equipment" means equipment: (a) whose primary design is for operation in non-highway environments and as such, is not titled or licensed by the state of Texas for use on state roadways. (e.g., construction equipment); and (b) that is powered by or that utilizes one or more non-road diesel-fueled compression-ignition engines that meet the emission standards for oxides of nitrogen (NOx) or non-methane hydrocarbon (NMHC)) + NOx set forth at 40 CFR § 89.112(a) ("Tier 1, 2 or 3 standards") non-road engines. Each non-road engine on each piece of Non-road Diesel Equipment must meet the Tier 1, 2 or 3 emission standards to qualify for an incentive payment.
- 9.13.3.2 Each engine must be verified by the EPA or California Air Resources Board (CARB) or otherwise accepted by the Texas Commission on Environmental Quality (TCEQ) as meeting the EPA Tier 1, 2 or 3 emission standards, and must be rated as 50 horsepower or above. The engine must be new, rebuilt or remanufactured. A rebuilt or remanufactured engine shall contain only original equipment manufacturer (OEM) components and must have been purchased from the OEM or its authorized dealers/distributors. A rebuilt or remanufactured engine provided by another entity may be accepted, if it has been certified by the TCEQ as meeting the Tier 1, 2 or 3 standards. In addition, retrofitting an existing diesel engine or adding devices to existing non-road diesel engines will make the equipment eligible for the incentive payment if the retrofit or add-on devices result in air emissions that otherwise meet EPA Tier 1, 2, or 3 standards.
- 9.13.4 NONROAD DIESEL EQUIPMENT MUST BE USED ON THE PROJECT SITE. In order to qualify for incentive payments, all Non-road Diesel Equipment must be used in the performance of work on the Project as defined under this Contract or on a Project-specific location that supports only the Project and is within one (1) mile of the Project (hereinafter referred to as the "Project Site" for purposes of Paragraph 9.13).

## 9.13.5 DOCUMENTATION

- 9.13.5.1 DESIGN-BUILD CONTRACTOR shall furnish, prior to issuance of a CGMP Amendment or if there is no CGMP, the GMP, a list of Non-road Diesel Equipment that DESIGN-BUILD CONTRACTOR proposes to qualify under Subparagraph 9.13.1.2 of this special provision for use in the performance of Project work. The list shall include the following information:
  - 9.13.5.1.1 An assigned DESIGN-BUILD CONTRACTOR-unique identification number, which shall be prominently placed on the exterior of individual pieces of Equipment;

- 9.13.5.1.2 The dates each piece of Equipment is anticipated to arrive and depart the Project Site, and an indication of whether the Equipment will be used in performance of Project work;
  9.13.5.1.3 For each piece of Equipment: the make, description, model number, identification number, and model year;
  9.13.5.1.4 For each engine: the make, model, identification number, model year, horsepower rating, test group (family code); and
- 9.13.5.1.5 Certification by EPA, CARB or TCEQ, and the Tier 1, 2 or 3 emission standards claimed.
- 9.13.5.2 DESIGN-BUILD CONTRACTOR shall also submit to the Director a report with its monthly request or estimate for payment that identifies what Nonroad Diesel Equipment was used on the Project during that month. The monthly reports shall include, but not be limited to, the equipment and engine identification number, how often the equipment was used required on the Project Site; and such other documentation as the Director may require. The Director may also require that reports and other documentation be submitted in an electronic format acceptable to the Director.
- 9.13.5.3 DESIGN-BUILD CONTRACTOR shall provide to the Director, upon request, copies of any or all equipment or engine certifications that are the basis for a request for payment. DESIGN-BUILD CONTRACTOR shall provide the requested copies within fifteen (15) business days after receipt of the request.
- 9.13.5.4 Failure of DESIGN-BUILD CONTRACTOR to submit a report or other documentation as required in this Paragraph 9.13.1.5.4 shall waive the DESIGN-BUILD CONTRACTOR's right to receive any incentive payment under this special provision for the period in question. The City of Houston may inspect each item of Nonroad Diesel Equipment used by the DESIGN-BUILD CONTRACTOR on the Project to insure compliance with the terms of this special provision, and to confirm Contractor's reports. If the Director reasonably believes that DESIGN-BUILD CONTRACTOR has provided inaccurate or false information, the City at Director's sole option, may revoke DESIGN-BUILD CONTRACTOR's qualification for the incentive payment, may terminate incentive payments, may adjust incentive payments, and take such other action as s/he deems appropriate.

# 9.13.6 INCENTIVE PAYMENT

9.13.6.1 The City shall pay DESIGN-BUILD CONTRACTOR an incentive at the following rates for DESIGN-BUILD CONTRACTOR's compliance with the terms of this special provision. Except as otherwise provided, the payment rates shall be calculated by multiplying the units of horsepower that each engine is rated to produce, by the payment rate, which shall increase according to the emission standard as indicated below.

EPA Tier	Incentive	Payment	Rate	per
Or Equivalent	Engine Horsepower Rating			
1	\$0.50			
2	\$0.75			
3		\$1.00		

- 9.13.6.2 The Director shall review the requests for payment to confirm that the Nonroad Diesel Equipment is eligible and was required to support the Project work. The Director shall adjust any request for payment for an incentive for use of Nonroad Diesel Equipment as provided in Paragraph 9.13.2.5.3. The Director may reject any request for an incentive payment if the Director deems the Equipment is ineligible. DESIGN-BUILD CONTRACTOR may protest in writing any adjustment within thirty (30) calendar days of receipt of the adjusted incentive payment. DESIGN-BUILD CONTRACTOR shall be deemed to have accepted the adjusted incentive payment if no protest is received by the Director within the 30-day period.
- 9.13.6.3 The Director shall adjust the calculation of any incentive payment for any Nonroad Diesel Equipment that was on the Project Site for less than thirty (30) calendar days. For example, adjustments shall be made for eligible equipment that arrives or was not used on the Project Site until after the 1st day of a month or leaves or is not used on the Project site before the last day of the month. The incentive payment shall be reduced as follows:
  - a. When the total is seven (7) calendar days or less, the incentive payment rate shall be multiplied by 0.10.
  - b. When the total is eight (8) calendar days or more but fifteen (15) calendar days or less, the incentive payment rate shall be multiplied by 0.25.
  - c. When the total is sixteen (16) calendar days or more but twenty-two (22) calendar days or less, the incentive payment rate shall be multiplied by 0.50.
  - d. When the total is twenty-three (23) calendar days or more but less than the entire month, the incentive payment rate shall be multiplied by 0.75.

(Example: A 125 h.p. front-end loader, rated at Tier 2, was used for twenty (20) calendar days on a project. The DESIGN-BUILD CONTRACTOR incentive would be (\$0.75 X 125h.p. =\$93.75 X 0.50 adj. factor for days of use = \$46.88.)

9.13.6.4 The incentive payments under this special provision shall not exceed \$20,000.

# **ARTICLE 10 - SAFETY PRECAUTIONS**

# 10.1 <u>SAFETY PROGRAMS</u>

10.1.1 DESIGN-BUILD CONTRACTOR is responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with performance of the Contract. DESIGN-BUILD CONTRACTOR shall submit a safety program to Director prior to mobilizing for the Work, and is solely responsible for safety, efficiency, and adequacy of ways, means, and methods, and for damage which might result from failure or improper construction, maintenance, or operation performed by DESIGN-BUILD CONTRACTOR.

# 10.2 POLLUTANTS AND POLLUTANT FACILITIES

- 10.2.1 If DESIGN-BUILD CONTRACTOR encounters material on-site which it reasonably believes to be a Pollutant or facilities which it reasonably believes to be a Pollutant Facility, DESIGN-BUILD CONTRACTOR shall immediately stop work in affected area and immediately notify Director, confirming the notice thereafter in writing.
- 10.2.2 If Director determines that the material is a Pollutant or facility is a Pollutant Facility, work in affected area may not be resumed except by Modification, and only if the work would not violate applicable laws or regulations.
- 10.2.3 If Director determines that the material is not a Pollutant or a facility is not a Pollutant Facility, work in affected area will be resumed upon issuance of a Modification.
- 10.2.4 DESIGN-BUILD CONTRACTOR may be required to perform work relating to Pollutants or Pollutant Facilities, including but not limited to abatement, handling, and disposal of Pollutants as authorized within the GMP or by Change Order. Title to the Pollutants shall remain with the City.
- 10.2.5 If any hazardous materials are moved to an offsite disposal facility:
  - 10.2.5.1 The Director will select the facility;
  - 10.2.5.2 The City will enter the contract with the facility;
  - 10.2.5.3 The Director will sign the manifests; and
  - 10.2.5.4 The DESIGN-BUILD CONTRACTOR will coordinate the transport, but the City will contract with the transporter.

If any hazardous materials are moved to an onsite disposal facility, then the DESIGN-BUILD CONTRACTOR will move the hazardous materials to an onsite location as designated by the Director.

# 10.3 SAFETY OF THE ENVIRONMENT, PERSONS, AND PROPERTY

- 10.3.1 DESIGN-BUILD CONTRACTOR shall take reasonable precautions for safety and shall provide reasonable protection to prevent damage, injury, or loss from all causes, to:
  - 10.3.1.1 employees performing work on-site, and other persons who may be affected thereby;
  - 10.3.1.2 work, including Products to be incorporated into the Work, whether in proper storage, under control of DESIGN-BUILD CONTRACTOR or Subcontractor; and
  - 10.3.1.3 other property at or adjacent to the site, such as trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal or replacement in course of construction.
- 10.3.2 DESIGN-BUILD CONTRACTOR shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on safety of persons, property, or environment.

- 10.3.2.1DESIGN-BUILD CONTRACTOR shall comply with requirements of Underground Facility Damage Prevention and Safety Act TEX. UTIL. CODE ANN. Ch. 251 (Vernon Supp. 2002).
- 10.3.2.2DESIGN-BUILD CONTRACTOR shall comply with all safety rules and regulations of the Federal Occupational Health and Safety Act of 1970 and subsequent amendments (OSHA).
- 10.3.3 DESIGN-BUILD CONTRACTOR shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection of persons and property, including posting danger signs and other warnings against hazards, promulgating safety regulations, and notifying owners and users of adjacent sites and utilities.
- 10.3.4 DESIGN-BUILD CONTRACTOR shall designate a responsible member of DESIGN-BUILD CONTRACTOR's organization at site whose duty is prevention of accidents. This person will be DESIGN-BUILD CONTRACTOR's Superintendent unless otherwise designated by DESIGN-BUILD CONTRACTOR in writing to Director.
- 10.3.5 DESIGN-BUILD CONTRACTOR shall prevent windblown dust and shall not burn or bury trash debris or waste products on-site or use sewers for the disposal of trash or debris. DESIGN-BUILD CONTRACTOR shall prevent environmental pollution, including but not limited to particulates, gases and noise, as a result of the Work.
- 10.3.6 When use or storage of hazardous materials or equipment, or unusual methods are necessary for execution of the Work, DESIGN-BUILD CONTRACTOR shall exercise utmost care and carry on the activities under supervision of properly qualified personnel.
- 10.3.7 DESIGN-BUILD CONTRACTOR shall promptly remedy damage and loss to property referred to in Subparagraphs 10.3.1.2 and 10.3.1.3, caused in whole or in part by DESIGN-BUILD CONTRACTOR, or Subcontractors, which is not covered by insurance required by the Contract. DESIGN-BUILD CONTRACTOR is not required to remedy damage or loss attributable to the City, or other contractors.

# 10.4 EMERGENCIES

10.4.1 In emergencies affecting safety of persons or property, DESIGN-BUILD CONTRACTOR shall act at DESIGN-BUILD CONTRACTOR's discretion to prevent imminent damage, injury, or loss. Additional compensation or extension of time claimed by DESIGN-BUILD CONTRACTOR because of emergencies are determined as provided in Article 7.

#### ARTICLE 11 - INSURANCE AND BONDS

# 11.1 GENERAL INSURANCE REQUIREMENTS

- 11.1.1 With no intent to limit DESIGN-BUILD CONTRACTOR's liability under indemnification and other provisions set forth in this Contract, DESIGN-BUILD CONTRACTOR shall provide and maintain in full force and effect during term of the Contract and all extensions and amendments thereto, at least the following insurance and available limits of liability.
- 11.1.2 If any of the following insurance is written as "claims made" coverage and the City is required to be carried as additional insured, then DESIGN-BUILD CONTRACTOR's insurance shall include a two-year extended discovery period after last date that DESIGN-BUILD CONTRACTOR provides any work under the Contract.

- 11.1.3 Aggregate amounts of coverage, for purposes of the Contract, are agreed to be amounts of coverage available during fixed 12-month policy period.
- 11.1.4 DESIGN-BUILD CONTRACTOR shall be liable to City for any required coverage that City does not have or costs, damage, losses, or liability incurred by City (including attorneys' fees) due to DESIGN-BUILD CONTRACTOR's failure to purchase and maintain required insurance.

# 11.2 INSURANCE TO BE PROVIDED BY DESIGN-BUILD CONTRACTOR

- 11.2.1 Risks and Limits of Liability: DESIGN-BUILD CONTRACTOR shall provide at a minimum insurance coverage and limits of liability set out in Table 1, with no gaps in coverage between primary and excess coverage.
  - 11.2.1.1 If Limit of Liability for Excess Coverage is \$2,000,000 or more, Limit of Liability for Employer's Liability may be reduced to \$500,000.
- 11.2.2 Form of Policies: Insurance may be in one or more policies of insurance, form of which is subject to approval by Director. It is agreed, however, that nothing Director does or fails to do with regard to insurance policies relieves DESIGN-BUILD CONTRACTOR from its duties to provide required coverage and Director's actions or inactions will never be construed as waiving the City's rights.
- 11.2.3 Issuers of Policies: Issuer of any policy shall have:
  - 11.2.3.1 a Certificate of Authority to transact business in Texas, or
  - 11.2.3.2 have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition of Best's Key Rating Guide, and the issuer must be an eligible non-admitted insurer in the State of Texas.

Each insurer is subject to approval by Director in Director's sole discretion as to conformance with these requirements, pursuant to Paragraph 11.2.2.

- 11.2.4 Insured Parties: The City shall be an Additional Insured under this Contract. Each policy, except those for Workers' Compensation and professional liability, must name the City, its officers, agents, and employees as Additional Insured parties on original policy and all renewals or replacements during term of the Contract. City's status as additional insured under DESIGN-BUILD CONTRACTOR's insurance does not extend to instances of sole negligence of City unmixed with any fault of DESIGN-BUILD CONTRACTOR.
- 11.2.5 Deductibles: DESIGN-BUILD CONTRACTOR assumes and bears any claims or losses to extent of deductible amounts and waives any claim it may ever have for same against the City, its officers, agents, or employees.
- 11.2.6 Cancellation: DESIGN-BUILD CONTRACTOR shall notify the Director in writing thirty (30) days prior to any cancellation or material change to DESIGN-BUILD CONTRACTOR's insurance coverage. Within the thirty (30) day period, DESIGN-BUILD CONTRACTOR shall provide other suitable policies in lieu of those about to be canceled or nonrenewed so as to maintain in effect the required coverage. If DESIGN-BUILD CONTRACTOR does not comply with this requirement, the Director, at his sole discretion, may immediately suspend DESIGN-BUILD CONTRACTOR from any further performance under this Contract and begin procedures to terminate for default.

- 11.2.7 Subrogation: DESIGN-BUILD CONTRACTOR waives any claim or right of in nature of subrogation to recover against the City, its officers, agents, or employees. Each policy, except professional liability, must contain an endorsement waiving such claim.
- 11.2.8 Endorsement of Primary Insurance: Each policy, except Workers' Compensation and professional liability policies, must contain an endorsement that the policy is primary insurance to any other insurance available to additional insured with respect to claims arising hereunder.
- 11.2.9 *Liability for Premium:* DESIGN-BUILD CONTRACTOR is solely responsible for payment of all insurance premium requirements hereunder and the City is not obligated to pay any premiums to insurers.
- 11.2.10 Additional Requirements for Workers' Compensation Insurance Coverage: DESIGN-BUILD CONTRACTOR shall, in addition to meeting the obligations set forth in Table 1, maintain throughout the term of the Contract Workers' Compensation coverage as required by statute, and DESIGN-BUILD CONTRACTOR shall specifically comply with requirements set forth in Paragraph 11.2.10. The definitions set out below shall apply only for purposes of this Paragraph 11.2.10.

## 11.2.10.1 Definitions:

- 11.2.10.1.1 Certificate of Coverage: A copy of certificate of insurance, or coverage agreement (TWCC-81, TWCC-82, TWCC-83, or TWCC-84), showing statutory Workers' Compensation insurance coverage for DESIGN-BUILD CONTRACTOR's, Subcontractor's, or Supplier's employees providing services for the duration of the Contract.
- 11.2.10.1.2 Duration of the Work: Includes the time from Date of Commencement of the Work until DESIGN-BUILD CONTRACTOR's work under the Contract has been completed and accepted by City Council.
- 11.2.10.1.3 Persons providing services for the Work (Subcontractor in Texas Labor Code § 406.096): includes all persons or entities performing all or part of services DESIGN-BUILD CONTRACTOR has undertaken to perform on the Work, regardless of whether that person contracted directly with DESIGN-BUILD CONTRACTOR and regardless of whether that person has employees. This includes, without limitation, independent contractors, subcontractors. leasing companies, motor carriers, owneroperators, employees of the entity, or employees of entity which furnishes persons to provide services on the Work. Services include, without limitation, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other service related to the Work. Services do not include activities unrelated to the Work, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.
- 11.2.10.2 DESIGN-BUILD CONTRACTOR shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of coverage agreements, which meets the statutory requirements of Tex. Lab. Code Ann., Section 401.011(44) for

employees of DESIGN-BUILD CONTRACTOR	providing	services
on the Work, for duration of the Work.		

- 11.2.10.3 DESIGN-BUILD CONTRACTOR shall provide a Certificate of Coverage to the City prior to beginning performance.
- 11.2.10.4 If coverage period shown on DESIGN-BUILD CONTRACTOR's original Certificate of Coverage ends during duration of the Work, DESIGN-BUILD CONTRACTOR shall file new Certificate of Coverage with the City showing that coverage has been extended.
- 11.2.10.5 DESIGN-BUILD CONTRACTOR shall obtain from each person providing services on the Work, and provide to Director:
  - 11.2.10.5.1 Certificate of Coverage, prior to that person beginning work on the Work, so the City will have on file Certificates of Coverage showing coverage for all persons providing services on the Work; and
  - 11.2.10.5.2 no later than seven (7) days after receipt by DESIGN-BUILD CONTRACTOR, new Certificate of Coverage showing extension of coverage, if coverage period shown on current Certificate of Coverage ends during the duration of the Work.
- 11.2.10.6 DESIGN-BUILD CONTRACTOR shall retain all required Certificates of Coverage for the duration of the Work and for one year thereafter.
- 11.2.10.7 DESIGN-BUILD CONTRACTOR shall notify Director in writing by certified mail or personal delivery, within ten (10) days after DESIGN-BUILD CONTRACTOR knew or should have known, of any change that materially affects provision of coverage of any person providing services on the Work.
- 11.2.10.8 DESIGN-BUILD CONTRACTOR shall post on-site a notice, in text, form and manner prescribed by Texas Workers' Compensation Commission, informing all persons providing services on the Work that they are required to be covered, and stating how person may verify coverage and report lack of coverage.
- 11.2.10.9 DESIGN-BUILD CONTRACTOR shall contractually require each person with whom it contracts to provide services on the Work to:
  - 11.2.10.9.1 provide coverage, based on proper reporting of classification codes, payroll amounts and filing of any coverage agreements, which meets statutory requirements of Tex. Lab. Code Ann., Section 401.011(44) for all its employees providing services on the Work, for the duration of the Work;
  - 11.2.10.9.2 provide to DESIGN-BUILD CONTRACTOR, prior to that person's beginning work on the Work, a Certificate of Coverage showing that coverage is being provided

- for all employees of the person providing services on the Work, for the duration of the Work;
- 11.2.10.9.3 provide DESIGN-BUILD CONTRACTOR, prior to the end of the coverage period, a new Certificate of Coverage showing extension of coverage, if the coverage period shown on the current Certificate of Coverage ends during the duration of the Work;
- 11.2.10.9.4 obtain from each other person with whom it contracts, and provide to DESIGN-BUILD CONTRACTOR: (1) Certificate of Coverage, prior to other person's beginning work on the Work; and (2) new Certificate of Coverage showing extension of coverage, prior to end of coverage period, if coverage period shown on the current Certificate of Coverage ends during duration of the Work.
- 11.2.10.9.5 retain all required Certificates of Coverage on file for the duration of the Work and for one year thereafter;
- 11.2.10.9.6 notify Director in writing by certified mail or personal delivery within ten (10) days after person knew, or should have known, of change that materially affects provision of coverage of any person providing services on the Work; and
- 11.2.10.9.7 contractually require each person with whom it contracts to perform as required by Paragraphs 11.2.10.1 through 11.2.10.7, with Certificates of Coverage to be provided to person for whom they are providing services.
- 11.2.10.10 By signing the Contract or providing or causing to be provided a Certificate of Coverage, DESIGN-BUILD CONTRACTOR is representing to the City that all employees of DESIGN-BUILD CONTRACTOR who will provide services on the Work will be covered by Workers' Compensation coverage for the duration of the Work, that coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with appropriate insurance carrier. DESIGN-BUILD CONTRACTOR is not allowed to self-insure Workers' Compensation. DESIGN-BUILD CONTRACTOR may be subject to administrative penalties, criminal penalties, civil penalties, or other civil actions for providing false or misleading information.
- 11.2.10.11 DESIGN-BUILD CONTRACTOR's failure to comply with Paragraph 11.2.10 is a breach of the Contract by DESIGN-BUILD CONTRACTOR, which entitles the City to declare the Contract void if DESIGN-BUILD CONTRACTOR does not remedy breach within ten (10) days after receipt of notice of breach from Director.
- 11.2.11 Subcontractor Insurance Requirements: DESIGN-BUILD CONTRACTOR shall require Subcontractors and Suppliers to obtain Commercial General Liability,

Workers' Compensation, Employer's Liability and Automobile Liability coverage that meets all the coverage requirements of Paragraph 11.2. The limits of liability may be reduced in the discretion of the Director. DESIGN-BUILD CONTRACTOR shall require all Subcontractors with whom it contracts directly, whose subcontracts exceed \$100,000, to provide proof of insurance coverage meeting the above requirements. DESIGN-BUILD CONTRACTOR shall deliver such certificates of insurance to City. DESIGN-BUILD CONTRACTOR shall comply with all requirements set out under Paragraph 11.2.10 as to Workers' Compensation Insurance for all Subcontractors and Suppliers. Additionally, if any Subcontractor will be performing any Work that may involve environmental liabilities, DESIGN-BUILD CONTRACTOR shall ensure that Pollution Liability coverage in the amount of \$1,000,000 per occurrence and \$1,000,000 in the aggregate is obtained prior to commencement of the Work, and it shall include contractual liability, cleanup costs, abatement, transport, and non-owned disposal sites, including bodily injury and environmental damage arising from pollution conditions caused in performance of operations, including asbestos and lead if part of operations (MCS-90 endorsement; \$1,000,000 CSL to Auto Policy and removal of Pollution exclusion).

TABLE 1
REQUIRED COVERAGE

Coverage	Limit of Liability		
.1 Workers' Compensation	Statutory Limits for Workers' Compensation		
.2 Employer's Liability	<ul> <li>Bodily Injury by Accident \$1,000,000 (each accident)</li> <li>Bodily Injury by Disease \$1,000,000 (policy limit)</li> <li>Bodily Injury by Disease \$1,000,000 (each employee)</li> </ul>		
.3 Commercial General Liability: Including DESIGN-BUILD CONTRACTOR's Protective, Broad Form Property Damage, Contractual Liability, Explosion, Underground and Collapse, Bodily Injury, Personal Injury, Products, and Completed Operations (for a period of one year following completion of the Work).  .4 Owner's and Contractor's Protective Liability	occurrence), subject to general per project aggregate of \$2,000,000;		
.5 Installation Floater (Unless alternative coverage approved by City Attorney)	Value of stored material or equipment, listed on Certificates of Payments, but not yet incorporated into the Work.		
.6 Automobile Liability Insurance: (For automobiles furnished by DESIGN-BUILD CONTRACTOR in course of its performance under the Contract, including Owned, Non-owned, and Hired Auto coverage)	<ul> <li>\$1,000,000 combined single limit each occurrence for (1) Any Auto or (2) All Owned, Hired, and Non-Owned Autos.</li> <li>\$10,000,000 for autos used on the airfield</li> </ul>		
.7 Excess Coverage	<ul> <li>\$10,000,000 each occurrence/combined per project aggregate in excess of limits specified for Employer's Liability, Commercial General Liability, and Automobile Liability</li> </ul>		

Coverage	Limit of Liability	
.8 Pollution Legal Liability:	\$1,000,000 per occurrence/aggregate	
Including pollution coverage for Contractual Liability, Clean-up costs, Abatement, Transport, and Non-owned disposal sites. Including Bodily Injury, and environmental damage arising from pollution conditions caused in performance of operations. Including Asbestos and Lead if part of operations (MCS-90 endorsement: \$1,000,000.00 CSL to Auto Policy and removal of Pollution Exclusion).		
.9 Coverage for tools, equipment, etc., not included in the Cost of the Work.	Value of items covered	
.10 Equipment floater policy to cover equipment in transit, at warehouse, jobsite or elsewhere until Work is turned over to City.	Value of equipment	
.11 Property & Casualty Coverage: "All Causes of Loss" Builders Risk Form for direct physical damage to building or plant construction on Project site. [Including but not limited to earthquake, flood, boiler and Machinery including testing, damage to existing or adjoining property, time element coverage, collapse, soft costs (Management, architecture, financial costs, pre-opening costs, etc.), transit coverage, off-site storage]	100% GMP, including all Change Orders	
.12 Professional Liability Coverage:	\$5,000,000 per claim/aggregate	
Aggregate Limits are per 12-month policy period unless otherwise indicated.		

## 11.3 PROOF OF INSURANCE

- 11.3.1 Prior to commencing services and at the request of the Director at any time during the term of the Contract, DESIGN-BUILD CONTRACTOR shall furnish Director with Certificates of Insurance along with Affidavit from DESIGN-BUILD CONTRACTOR confirming that Certificate accurately reflects insurance coverage that is available during term of the Contract. Additionally, DESIGN-BUILD CONTRACTOR shall furnish the Director with endorsement forms CG24040509-Waiver of Transfer of Rights of Recovery against Others; CA04030604-Additional Insured Endorsement; CAT353-Business Auto Extension Endorsement; WC 42304A-Workers Compensation Waiver of Transfer of Rights of Recovery against Others, or others that may be approved by Director. If requested in writing by Director, DESIGN-BUILD CONTRACTOR shall furnish Director with certified copies of DESIGN-BUILD CONTRACTOR's actual insurance policies. Failure of DESIGN-BUILD CONTRACTOR to provide certified copies, as requested, may be deemed, at Director's or City Attorney's discretion, a material breach of the Contract.
- 11.3.2 Notwithstanding the proof of insurance requirements, DESIGN-BUILD CONTRACTOR shall continuously maintain in effect required insurance coverage set forth in Paragraph 11.2. Failure of DESIGN-BUILD CONTRACTOR to comply with this requirement does constitute a material breach by DESIGN-BUILD CONTRACTOR allowing the City, at its option, to immediately suspend or terminate DESIGN-BUILD CONTRACTOR from performing the Work, or exercise any other remedy allowed under the Contract. DESIGN-BUILD CONTRACTOR agrees that the City has not waived or is not estopped to assert a material breach of the Contract because of any acts or omissions by the City regarding its

- review or non-review of insurance documents provided by DESIGN-BUILD CONTRACTOR, its agents, employees, or assigns.
- 11.3.3 DESIGN-BUILD CONTRACTOR shall provide updated certificates of insurance to the Director upon request. The DESIGN-BUILD CONTRACTOR shall be responsible for delivering a current certificate of insurance in the proper form to the Director as long as DESIGN-BUILD CONTRACTOR is required to furnish insurance coverage under Paragraph 11.2.
- 11.3.4 Every certificate of insurance DESIGN-BUILD CONTRACTOR delivers in connection with this Contract shall:
  - 11.3.4.1 be less than 12 months old;
  - 11.3.4.2 include all pertinent identification information for the Insurer, including the company name and address, policy number, NAIC number or AMB number, and authorized signature;
  - 11.3.4.3 include in the Certificate Holder Box the Project name and reference numbers, and indicates the name and address of the Director:
  - 11.3.4.4 include the DESIGN-BUILD CONTRACTOR's email address in the Certificate Holder Box;
  - 11.3.4.5 include the Project reference numbers on the City address so the Project reference number is visible in the envelope window; and
  - 11.3.4.6 be appropriately marked to accurately identify all coverages and limits of the policy, effective and expiration dates, and waivers of subrogation in favor of the City for Commercial General Liability, Automobile Liability, and Worker's Compensation/Employers' Liability.

## 11.4 PERFORMANCE AND PAYMENT BONDS

11.4.1 DESIGN-BUILD CONTRACTOR shall provide Bonds on the City's standard forms covering faithful performance of the Contract and payment of obligations arising thereunder as required in the Contract pursuant to Chapters 2253 and 2269 of the Texas Government Code, except for Preconstruction Phase services but including a CGMP occurring within the Preconstruction Phase. The Bonds must be for 100 percent (100%) of the CGMP or GMP (as applicable), as determined by the Director and in accordance with conditions stated on standard City Performance and Payment Bond and Statutory Payment Bond forms. Bonds may be obtained from DESIGN-BUILD CONTRACTOR's usual source if it meets the requirements of the Contract Documents and is acceptable to Director, and cost for the Bonds are included in the CGMP and GMP. If a CGMP is in in progress when the GMP is established, the DESIGN-BUILD CONTRACTOR must provide Bonds for 100% of the GMP minus any outstanding CGMPs.

#### 11.5 MAINTENANCE BONDS

11.5.1 One-Year *Maintenance Bond:* DESIGN-BUILD CONTRACTOR shall provide Bond on a standard City Maintenance Bond form, providing for DESIGN-BUILD CONTRACTOR's correction, replacement, or restoration of any portion of the Work which is found to be not in compliance with requirements of the Contract during the Correction Period required in Paragraph 12.2. The Maintenance Bond must be for twenty-five percent (25%) of the GMP.

11.5.2 One-Year Surface Correction Bond: DESIGN-BUILD CONTRACTOR shall provide, on the City standard form, an additional one (1) year Bond in an amount equal to four percent (4%) of the GMP or cost of repair. Bond shall provide for DESIGN-BUILD CONTRACTOR's correction, replacement, or restoration of backfill or subsurface and surface work not in accordance with the Contract, within one year from the date the One-Year Maintenance Bond has expired.

#### 11.6 SURETY

- 11.6.1 A Bond that is given or tendered to the City pursuant to the Contract must be executed by a surety company that is authorized and admitted to write surety Bonds in the State of Texas.
- 11.6.2 If a Bond is given or tendered to the City pursuant to the Contract in an amount greater than ten percent (10%) of Surety's capital and surplus, Surety shall provide certification that Surety has reinsured that portion of the risk that exceeds ten percent (10%) of Surety's capital and surplus. The reinsurance must be with one or more reinsurers who are duly authorized, accredited, or trusted to do business in the State of Texas. The amount reinsured by reinsurer may not exceed ten percent (10%) of reinsurer's capital and surplus. The amount of allowed capital and surplus must be based on information received from State Board of Insurance.
- 11.6.3 If the amount of a Bond is greater than \$100,000, Surety shall:
  - 11.6.3.1 also hold certificate of authority from the United States Secretary of Treasury to qualify as surety on obligations permitted or required under federal law; or,
  - 11.6.3.2 Surety may obtain reinsurance for any liability in excess of \$100,000 from reinsurer that is authorized and admitted as a reinsurer in the State of Texas and is the holder of a certificate of authority from the United States Secretary of the Treasury to qualify as surety or reinsurer on obligations permitted or required under federal law.
- 11.6.4 Determination of whether Surety on the Bond or the reinsurer holds a certificate of authority from the United States Secretary of the Treasury is based on information published in Federal Register covering the date on which Bond was executed.
- 11.6.5 Each Bond given or tendered to the City pursuant to the Contract must be on City forms with no changes made by DESIGN-BUILD CONTRACTOR or Surety, and must be dated, executed, and accompanied by power of attorney stating that the attorney in fact executing such the bond has requisite authority to execute such Bond. The Bonds must be dated and must be no more than thirty (30) days old.
- 11.6.6 Surety shall designate in its Bond, power of attorney, or written notice to the City, an agent resident in Harris County to whom any requisite notices may be delivered and on whom service of process may be had in matters arising out of the suretyship.
- 11.6.7 DESIGN-BUILD CONTRACTOR shall furnish information to a payment bond beneficiary as required by TEX. GOV'T CODE ANN. CH. 2253.
- 11.6.8. In the event the Surety becomes unacceptable to the City during the course of the Project, DESIGN-BUILD CONTRACTOR shall furnish replacement Bonds from an acceptable Surety upon written notice.

#### 11.7 DELIVERY OF BONDS

11.7.1 DESIGN-BUILD CONTRACTOR shall deliver required Bonds to the City within time limits stated in the Contract Documents or such earlier dates as required by Director and in any event prior to Date of Commencement of the Work.

#### ARTICLE 12 - UNCOVERING AND CORRECTION OF THE WORK

## 12.1 UNCOVERING OF THE WORK

12.1.1 If a portion of the Work has been covered which Director has not specifically requested to observe prior to it being covered, Director may request to see such work and it must be uncovered by DESIGN-BUILD CONTRACTOR. If such work is in accordance with the Contract Documents, the costs of uncovering and covering such Work that qualifies as Cost of the Work are charged to the City by Change Order in accordance with Article 7. If such Work is not in accordance with the Contract, DESIGN-BUILD CONTRACTOR shall pay for uncovering and shall correct the nonconforming Work promptly after receipt of Notice of Noncompliance to do so.

#### 12.2 CORRECTION OF THE WORK

- 12.2.1 DESIGN-BUILD CONTRACTOR shall promptly correct or remove work rejected by Director or work failing to conform to requirements of the Contract, whether observed before or after the Date of Substantial Completion phase of Construction and whether fabricated, installed, or completed.
- 12.2.2 DESIGN-BUILD CONTRACTOR bears the costs of correcting the rejected or nonconforming work including additional testing and inspections, and expenses made necessary thereby.
- 12.2.3 If within one (1) year after Date of Substantial Completion of a phase of Construction or after the date of commencement of warranties established under Paragraph 11.11, or by other applicable special warranty required by the Contract, whichever is later in time, if any of the Work is found not to be in accordance with the requirements of the Contract, DESIGN-BUILD CONTRACTOR shall correct such work promptly after receipt of Notice of Noncompliance to do so.
- 12.2.4 The Correction Period does not establish a duration for the DESIGN-BUILD CONTRACTOR's general warranty under Paragraph 3.12 and other obligations under the Contract. The City retains the right to recover damages from the DESIGN-BUILD CONTRACTOR as long as may be permitted by the applicable statute of limitations and repose.
- 12.2.5 If DESIGN-BUILD CONTRACTOR does not proceed with correction of the nonconforming work within the reasonable time fixed by Notice of Noncompliance, the City may correct nonconforming work or remove nonconforming work and store salvageable Products at DESIGN-BUILD CONTRACTOR's expense. DESIGN-BUILD CONTRACTOR shall pay the costs of correction of nonconforming work and removal and storage of salvageable Products to the City. If DESIGN-BUILD CONTRACTOR does not pay costs of the correction or removal and storage within ten (10) days after written notice, the City may sell the Products at auction or at private sale. The City will account for proceeds thereof after deducting costs and damages that would have been borne by DESIGN-BUILD CONTRACTOR, including compensation for services of Designer and necessary expenses. If the proceeds of sale do not cover costs which DESIGN-BUILD

CONTRACTOR should have borne, DESIGN-BUILD CONTRACTOR shall pay the value of the deficiency to the City.

12.2.6 DESIGN-BUILD CONTRACTOR bears the cost of correcting work originally installed by DESIGN-BUILD CONTRACTOR, the City, or by separate Contractors and damaged by DESIGN-BUILD CONTRACTOR's correction or removal of DESIGN-BUILD CONTRACTOR's work.

# 12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If Director prefers to accept work which is not in accordance with requirements of the Contract Documents, Director may do so only by issuance of Change Order, instead of requiring its removal and correction. The DESIGN-BUILD CONTRACTOR and Director will mutually agree on the CGMP or GMP reduction, as applicable. The reduction will become effective even if final payment has been made.

#### **ARTICLE 13 - MISCELLANEOUS PROVISIONS**

## 13.1 GOVERNING LAWS

- 13.1.1 The Contract is subject to the laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction.
- 13.1.2 Venue for any litigation relating to the Contract is Harris County, Texas.

#### 13.2 SUCCESSORS

13.2.1 The Contract binds and benefits the Parties and their legal successors and permitted assigns; however, this Paragraph 13.2.1 does not alter the restrictions on assignment and disposal of assets set out in Paragraph 13.3.1. The Contract does not create any personal liability on the part of any officer or agent of the City.

#### 13.3 BUSINESS STRUCTURE AND ASSIGNMENTS

- 13.3.1 DESIGN-BUILD CONTRACTOR may not assign the Contract at law or otherwise, or dispose of all or substantially all of its assets without Director's prior written consent (nor shall any member of the joint venture, if the DESIGN-BUILD CONTRACTOR is a joint venture). Nothing in this Paragraph, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, DESIGN-BUILD CONTRACTOR shall immediately furnish the City with proof of the assignment and the name, telephone number, and address of the assignee and a clear identification of the fees to be paid to the assignee.
- 13.3.2 Any series, as defined by the TEX. BUS. ORG. CODE ANN., affiliate, subsidiary, or successor to which DESIGN-BUILD CONTRACTOR assigns or transfers assets shall join in privity and be jointly and severally liable under this Contract.

#### 13.4 WRITTEN NOTICE

13.4.1 All notices required or permitted by the Contract must be in writing and must be effected by hand delivery; registered or certified mail, return receipt requested; or facsimile with confirmation copy mailed to receiving Party or e-mail with a confirmation copy mailed to receiving Party. Notice is sufficient if made or addressed with proper postage to the

address stated in the Contract for each Party ("Notice Address") or faxed to the facsimile number or e-mailed to the e-mail address stated in the Contract for each Party. The notice is deemed delivered on the earlier of:

- 13.4.1.1 the date the Notice is actually received;
- 13.4.1.2 the third day following deposit in a United States Postal Service post office or receptacle; or
- 13.4.1.3 the date the facsimile or e-mail is sent unless the facsimile or e-mail is sent after 5:00 p.m. local time of the recipient and then it is deemed received on the following day.

Any Party may change its Notice Address, facsimile number, or e-mail address at any time by giving written notice of the change to the other Party in the manner provided for in this Paragraph at least fifteen (15) days prior to the date the change becomes effective.

## 13.5 RIGHTS AND REMEDIES

- 13.5.1 Duties and obligations imposed by the Contract and rights and remedies available thereunder are in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law.
- 13.5.2 No act or failure to act by the City or DESIGN-BUILD CONTRACTOR is a waiver of rights or duties afforded them under the Contract, nor is the act or failure to act constitute approval of or acquiescence in a breach of the Contract. No waiver, approval or acquiescence is binding unless in writing and, in the case of the City, signed by Director.

## 13.6 <u>TESTS AND INSPECTIONS</u>

- 13.6.1 DESIGN-BUILD CONTRACTOR shall give Director timely notice of the time and place where tests and inspections are to be made. DESIGN-BUILD CONTRACTOR shall cooperate with inspection and testing personnel to facilitate required inspections or tests.
- 13.6.2 The City will employ and pay for services of an independent testing laboratory to perform inspections or acceptance tests required by the Contract Documents except:
  - 13.6.2.1 inspections or tests covered by Paragraph 13.6.3;
  - 13.6.2.2 those otherwise specifically provided in the Contract Documents; or
  - 13.6.2.3 costs incurred in connection with tests or inspections conducted pursuant to Paragraph 12.2.2.
- 13.6.3 DESIGN-BUILD CONTRACTOR is responsible for and shall pay all costs in connection with inspection or testing required in connection with Director's acceptance of a Product to be incorporated into the Work, or of materials, mix designs, or equipment submitted for approval prior to DESIGN-BUILD CONTRACTOR's purchase thereof for incorporation into the Work.
- 13.6.4 Neither observations by the City nor inspections, tests, or approvals by others, relieves DESIGN-BUILD CONTRACTOR from DESIGN-BUILD CONTRACTOR's obligations to perform the Work in accordance with the Contract Documents.

13.6.5 If testing, inspection, or approval reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, DESIGN-BUILD CONTRACTOR shall bear all costs made necessary by such failure, including those of repeated procedures and compensation for City's services and expenses.

#### 13.7 INTEREST

13.7.1 No interest will accrue on late payments by the City except as provided under Chapter 2251 of the Government Code.

# 13.8 PARTIES IN INTEREST

13.8.1 The Contract does not bestow any rights upon any third party, but binds and benefits the Parties only.

#### 13.9 ENTIRE CONTRACT

13.9.1 The Contract merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions, covenants, express or implied, or other terms of any kind, exist between the Parties regarding the Contract.

# 13.10 WRITTEN AMENDMENT

13.10.1 Changes to the Contract that cannot be effected by Modifications, must be made by written amendment, which will not be effective until approved by City Council.

## 13.11 COMPLIANCE WITH LAWS

- 13.11.1 DESIGN-BUILD CONTRACTOR shall comply with the Americans with Disabilities Act of 1990 as amended (ADA) and Texas Architectural Barriers Act and all regulations relating to either statute.
- 13.11.2 DESIGN-BUILD CONTRACTOR shall comply with all applicable federal, state, and city laws, rules, ordinances, and regulations. Nothing herein shall be construed to require that DESIGN-BUILD CONTRACTOR ensures that the contract documents are prepared in accordance with applicable laws.

#### 13.12 ENFORCEMENT

13.12.1 City Attorney or designee has the right to enforce all legal rights and obligations under the Contract without further authorization.

#### 13.13 SEVERABILITY

13.13.1 If any part of the Contract is for any reason found to be unenforceable, all other parts remain enforceable to the extent permitted by law.

# ARTICLE 14 - TERMINATION OR SUSPENSION OF THE CONTRACT

#### 14.1 TERMINATION BY THE CITY FOR CAUSE

14.1.1 Each of the following acts or omissions of DESIGN-BUILD CONTRACTOR or occurrences shall constitute an "Event of Default" under the Contract:

- 14.1.1.1 DESIGN-BUILD CONTRACTOR refuses or fails to supply enough properly skilled workers or proper Products;
- 14.1.1.2 DESIGN-BUILD CONTRACTOR disregards laws, ordinances, rules, regulations, or orders of a public authority having jurisdiction;
- 14.1.1.3 DESIGN-BUILD CONTRACTOR is guilty of material breach of any duty or obligation of DESIGN-BUILD CONTRACTOR under the Contract, including, but not limited to, failure to submit certified payrolls electronically;
- 14.1.1.4 DESIGN-BUILD CONTRACTOR has had any other contract with the City terminated for cause at any time subsequent to the effective date of the Contract as set out in the Contract; or,
- 14.1.1.5 DESIGN-BUILD CONTRACTOR fails to utilize Ultra Low Sulfur Diesel Fuel, as required in Paragraph 3.9.1.1.
- 14.1.2 If an Event of Default occurs, Director may, at his option and without prejudice to any other rights or remedies which the City may have, deliver a written notice to DESIGN-BUILD CONTRACTOR and Surety describing the Event of Default and giving the DESIGN-BUILD CONTRACTOR ten (10) days to commence and diligently pursue the cure of the Event of Default. If after the ten (10) day cure period, DESIGN-BUILD CONTRACTOR has failed or refused to commence and diligently pursue the cure of the Event of Default, then Director may deliver a second written notice to DESIGN-BUILD CONTRACTOR giving notice of the termination of the Contract or of the termination of DESIGN-BUILD CONTRACTOR's performance under the Contract ("Notice of Termination"). If Director issues a Notice of Termination, then Director may, subject to any prior rights of Surety and any other rights of the City under the Contract Documents or at law:
  - 14.1.2.1 request that Surety take over and restart the Work within thirty (30) days of termination and complete the Work within a reasonable period of time as established by the Director; or
  - 14.1.2.2 take possession of the site and all materials, equipment, tools, and construction equipment and machinery on the site owned by DESIGN-BUILD CONTRACTOR; and
  - 14.1.2.3 finish the Work by whatever reasonable method Director may deem expedient.
- 14.1.3 After DESIGN-BUILD CONTRACTOR's receipt of a Notice of Termination, and except as otherwise directed in writing by Director, DESIGN-BUILD CONTRACTOR shall:
  - 14.1.3.1 stop the Work on the date and to the extent specified in the Notice of Termination;
  - 14.1.3.2 place no further orders or subcontracts for Products or services;
  - 14.1.3.3 suspend all orders and subcontracts to the extent that they relate to performance of work terminated;
  - 14.1.3.4 assign to the City, in the manner, at the times, and to the extent directed by Director, all rights, title, and interest of DESIGN-BUILD CONTRACTOR, under the terminated supply orders and subcontracts. The City may settle or pay claims arising out of termination of the orders and subcontracts;

- 14.1.3.5 settle all outstanding liabilities and all claims arising out of the termination of supply orders and subcontracts with approval of Director;
- 14.1.3.6 take action as may be necessary, or as Director may direct, for protection and preservation of property related to the Work that is in possession of DESIGN-BUILD CONTRACTOR, and in which the City has or may acquire an interest; and
- 14.1.3.7 secure the Work in a safe state before leaving the site, return all rented equipment, providing any necessary safety measures, shoring, or other devices.
- 14.1.4 If the City terminates the Contract or terminates DESIGN-BUILD CONTRACTOR's performance under the Contract for any one or more of the reasons stated in Paragraph 14.1.1, DESIGN-BUILD CONTRACTOR may not receive any further payment until the Work is complete, subject to Paragraph 14.1.5.
- 14.1.5 If the unpaid balance of a CGMP or the GMP, as applicable, exceeds the costs of finishing the Work, including liquidated damages and other amounts due under the Contract, the balance will be paid to DESIGN-BUILD CONTRACTOR. If the costs of finishing the Work exceed the unpaid balance, DESIGN-BUILD CONTRACTOR shall, within ten (10) days of receipt of written notice setting out the amount of the excess costs, pay the difference to the City. The amount to be paid to DESIGN-BUILD CONTRACTOR or the City will be certified by Director in writing, and this obligation for payment shall survive termination of the Contract or termination of DESIGN-BUILD CONTRACTOR's performance under the Contract. Termination of the DESIGN-BUILD CONTRACTOR for cause shall not relieve the Surety from its obligation to complete the Project.
- 14.1.6. An adjudicated improper termination for cause by the City shall be converted to a termination for convenience and the DESIGN-BUILD CONTRACTOR's entitlement shall be as set forth in Paragraph 14.2.

#### 14.2 TERMINATION BY THE CITY FOR CONVENIENCE

- 14.2.1 Director may, without cause and without prejudice to any other rights or remedies of the City, give DESIGN-BUILD CONTRACTOR and Surety a Notice of Termination with a seven (7) days written notice.
- 14.2.2 After receipt of the Director's Notice of Termination, and except as otherwise approved by Director, DESIGN-BUILD CONTRACTOR shall conform to requirements of Paragraph 14.1.3.
- 14.2.3 After receipt of the Notice of Termination, DESIGN-BUILD CONTRACTOR shall submit to the City its termination Claim, in forms required by Director. The Claim will be submitted to the City promptly, but no later than six months from the effective date of termination, unless one or more extensions are granted by Director in writing. If DESIGN-BUILD CONTRACTOR fails to submit its termination Claim within the time allowed, in accordance with Paragraph 14.2.4, Director will determine, on the basis of available information, the amount, if any, due to DESIGN-BUILD CONTRACTOR because of termination, and Director's determination is final and binding on the Parties. The City will then pay to DESIGN-BUILD CONTRACTOR the amount so determined.
- 14.2.4 Director will determine, on the basis of information available to Director, the amount due, if any, to DESIGN-BUILD CONTRACTOR for the termination as follows:

- 14.2.4.1 Payment for all Work performed in accordance with the Contract Documents up to the date of termination determined in the manner prescribed for monthly payments in Article 9 and other applicable Contract Documents, except no retainage is withheld by the City with respect to the terminated Work either for payment determined by percentage of completion or for materials and equipment delivered to the site, in storage or in transit.
- 14.2.4.2 Reasonable termination expenses that would qualify as Cost of the Work, including, to the extent they qualify as Cost of the Work, including costs for settling and paying Subcontractor and Supplier claims arising out of termination of the Work under their respective Subcontracts and purchase orders, reasonable cost of preservation and protection of the City's property after termination if required, and the cost of Claim preparation Termination expenses do not include field or central office overhead, salaries of employees of DESIGN-BUILD CONTRACTOR or litigation costs (including, but not limited to, attorneys' fees).

No amount is allowed for anticipated profit or central office overhead on uncompleted work, or any cost or lost profit for other business of DESIGN-BUILD CONTRACTOR alleged to be damaged by the termination.

- 14.2.5 DESIGN-BUILD CONTRACTOR shall promptly remove from the site any construction equipment, tools, and temporary facilities, except the temporary facilities not needed for Work not terminated which Director may wish to purchase and retain.
- 14.2.6 DESIGN-BUILD CONTRACTOR shall cooperate with Director during the transition period.
- 14.2.7 The City will take possession of the Work and materials delivered to the site, in storage, or in transit, as of date or dates specified in the Notice of Termination, and is responsible for maintenance, utilities, security, and insurance, as stated in Notice of Termination.

# 14.3 SUSPENSION BY THE CITY FOR CONVENIENCE

- 14.3.1 Director may, without cause, after giving DESIGN-BUILD CONTRACTOR and Surety 24-hour prior written notice, order DESIGN-BUILD CONTRACTOR to suspend, delay, or interrupt the Work in whole or in part for a period of time as Director may determine.
- 14.3.2 An adjustment will be made in Contract Time equivalent to the time of suspension.
- 14.3.3 Adjustment will be made to CGMP or the GMP for increases in the Cost of the Work, caused by such suspension, delay, or interruption of the Work plus a proportionate increase in the DESIGN-BUILD CONTRACTOR's Fee in accordance with Paragraph 7.3. No adjustment shall be made to the extent that:
  - 14.3.3.1 performance was, or would have been, suspended, delayed, or interrupted by another cause for which DESIGN-BUILD CONTRACTOR is responsible; or
  - 14.3.3.2 adjustment is made or denied under another provision of the Contract.

#### 14.4 TERMINATION BY DESIGN-BUILD CONTRACTOR

14.4.1 DESIGN-BUILD CONTRACTOR may terminate the Contract if the Work is stopped for a period of thirty (30) days through no act or fault of DESIGN-BUILD CONTRACTOR, directly related to one of these events:

- 14.4.1.1 issuance of an order of a court or other public authority having jurisdiction, other than the City acting in its role as a project owner;
- 14.4.1.2 act of government, such as a declaration of national emergency that makes material unavailable; or,
- 14.4.1.3 if repeated suspensions, delays, or interruptions by the City as described in Paragraph 14.3 constitute, in the aggregate, more than 100 percent (100 %) of the total number of days scheduled for completion, or one-hundred and twenty (120) days in any 365-day period, whichever is less;

No termination will be effective for the above reasons unless DESIGN-BUILD CONTRACTOR delivers written notice to Director describing the reason for termination, giving the proposed termination date, and granting the City a reasonable opportunity to respond and cure any City default before termination is effective.

14.4.2 If the Contract is terminated pursuant to this Paragraph 14.4, DESIGN-BUILD CONTRACTOR shall comply with the requirements of Paragraphs 14.2.2 through 14.2.7.

**END OF GENERAL CONDITIONS (DESIGN BUILD)** 

# **EXHIBIT "D"**

# **KEY PERSONNEL STAFF CLASSIFICATION AND RATES**

DESIGNATED F	REPRESENTATIVE	
On - Site Staff	Role	Rate
Off - Site Staff	Role	Rate

# EXHIBIT "E" PRECONSTRUCTION SERVICES SCHEDULE

# **EXHIBIT "F"**

# **GUARANTEED MAXIMUM PRICE PROPOSAL\***

and DESIGN ("GMP") for t	("DESIGN-BUILD Coas ("the City") pursuant to the -BUILD CONTRACTOR dated the Project (as defined in the e Contract), as follows:	, a Gu	by and between the City aranteed Maximum Price
1. Cost of	of the Work	\$	
a.	Included in the Cost of Work a	above is the General Condi	tions Work for the Project
b.	The following Cash Allowance  1. 2.		of Work above:
C.	The following Alternates are in 1		above:
d.	The following Unit Priced Wor 1 2		Work above:
e.	The following Contingency is \$	included in the Cost of Wor ——	k above:
	ruction Phase Fee ( <u>%</u> ): ntage of (Cost of the Work ince and bonds)	\$ minus Pass-through items	s and Cash Allowances,
	anteed Maximum Price (GMP) = 1 + 2)	\$	
For G	MP Proposal Cost Breakdown	see Exhibit 1 attached here	eto.
	GMP for the Project includes a date of signing this GMP.	all Claims, Work, and Cha	ange Orders in existence

hereto.

5. The Contract Documents upon which the GMP is based are set forth in Exhibit 7 attached

<sup>\*</sup>For purposes of this Exhibit, DESIGN-BUILD CONTRACTOR shall utilize this form to submit its CGMP or GMP proposal. References to GMP may be changed to CGMP for CGMP submission. \*\*CGMPs may be entered into without the need of a contract amendment and are effective upon the Director's approval. The GMP must approved by City Council in order to be effective.

- 6. DESIGN-BUILD CONTRACTOR shall provide complete performance of the Work for the GMP. In the event of a conflict among the Contract Documents, the DESIGN-BUILD CONTRACTOR shall fulfill the greater of the requirements set forth in the Contract, the Document 00700 General Conditions, the Specifications, the Drawings, and needs of the City.
- 7. The Clarifications & Assumptions made by the DESIGN-BUILD CONTRACTOR are set forth in Exhibit 4.
- DESIGN-BUILD CONTRACTOR shall achieve completion of the milestones within \_\_\_\_
   Calendar Days from issuance of Notice to Proceed.
- 9. DESIGN-BUILD CONTRACTOR waives all rights to an extension of time or delay damages for any events or circumstances prior to the date of signing this GMP.

The following exhibits are incorporated into the GMP:

- Exhibit 1 Summary of Work, including a list of all Construction Documents.
- Exhibit 2 GMP Price Summary with line item Schedule of Values.
- Exhibit 3 Project Team and Burden Rates
- Exhibit 4 Scope Clarifications and Assumptions.
- Exhibit 5 Procurement Plan.
- Exhibit 6 GMP Construction Schedule.
- Exhibit 7 Analysis of Impact on the Total Construction Budget and Project Schedule.
- Exhibit 8 MWBE/WBE/DBE/SBE participation level, including a total-to date participation level status report.
- Exhibit 9 Permitting Plan.
- Exhibit 10 Risk Management Plan.
- Exhibit 11 Construction Work Plan.
- Exhibit 12 Commissioning and Activation Plans.
- Exhibit 13 Project Manuals.
- Exhibit 14 Bonds
- Exhibit 15 Insurance

	ant and have been found to meet established Legal has not reviewed the content of this document or its t 15.
Legal Assistant	Date
DIRECTOR	DB
Name:	[DESIGN-BUILD CONTRACTOR]
Date of Signing:	Signature:
	Name:
	Title:
	Date of Signing:

The insurance and bonds for this Guaranteed Maximum Price form have been reviewed as to

# **EXHIBIT "G"**

## FORMS OF BONDS

The following documents are incorporated by reference:

- City of Houston Standard Document No. 00610 Performance Bond
- City of Houston Standard Document No. 00611 Statutory Payment Bond
- City of Houston Standard Document No. 00612 One-Year Maintenance Bond
- City of Houston Standard Document No. 00613 One-Year Surface Correction Bond

# EXHIBIT "H" CITY'S WAGE RATES

# EXHIBIT "I" PROJECT SCHEDULE

#### **EXHIBIT "J"**

#### DISPUTE AVOIDANCE AND RESOLUTION

# **EXHIBIT "J"**

#### DISPUTE AVOIDANCE AND RESOLUTION

#### A. INFORMAL NEGOTIATIONS AND ELIGIBLE DISPUTES

- 1. The Parties will use reasonable best efforts to resolve Eligible Disputes (as defined below) arising in the normal course of business at the lowest organizational level of staff with appropriate authority to resolve such disputes on behalf of the City and Design-Build Contractor. In connection with such informal negotiations, the Party asserting the dispute shall provide the other(s) with a written description of the nature of the dispute, along with reasonable and sufficient supporting documentation. At the Director's request, Design-Build Contractor shall involve its senior representatives, including senior representatives of any of its subcontractors, in such negotiations. Design-Build Contractor shall specifically bind all of their respective subcontractors or subconsultants to the provisions of this Exhibit. The City may join Design-Build Contractor with respect to any Eligible Dispute involving the other. Design-Build Contractor may join their respective subcontractors or subconsultants as appropriate for resolution of Eligible Disputes.
- 2. For purposes of this Dispute Avoidance and Resolution Process only, "Parties" shall mean the City acting through the Director and Design-Build Contractor.
- 3. "Eligible Dispute" shall mean any dispute that satisfies the following criteria:
  - (a) Is between the City and the Design-Build Contractor;
  - (b) Involves any one or more of the following areas relating to either the City's agreement with Design-Build Contractor: the day-to-day administration of the agreements, performance of the agreements, or statements of work related to the subject matter of the agreements;
  - (c) Does not involve a question of law;
  - (d) Arises during the performance of either the City's agreement with Design-Build Contractor or any subsequent renewals thereof; and
  - (e) Is not resolved among the City and Design-Build Contractor in the ordinary course of business.
- 4. Upon the expenditure of reasonable efforts towards resolution of a dispute through informal negotiations without reaching resolution, a Party may declare that the informal negotiations have been exhausted and such Party may request to convene the Dispute Avoidance and Resolution Board ("DARB") as described below. If the DARB is unable to resolve the dispute, a Party may elect to proceed with Non-Binding Mediation as described below. Design-Build Contractor may elect to make a Claim to the Director as set out in Section 4.3 et seq. of the General Conditions.

# B. DISPUTE AVOIDANCE AND RESOLUTION BOARD ("DARB")

- 1. The DARB may consider Eligible Disputes and provide written recommendations to the Director or Design-Build Contractor, or their respective subcontractors or subconsultants, as applicable.
- 2. The DARB shall consist of three (3) neutral members, and shall not have been previously employed or acted as consultant or as a subconsultant to a consultant in any capacity for any Party; one each chosen by the Director and Design-Build Contractor and one jointly chosen by the Director and the Design-Build Contractor. The members shall elect among them a Chairperson ("Chair"). If any Party's appointed member terminates his or her involvement on the DARB, the affected Party may nominate a replacement, who shall be appointed to the DARB unless the other Parties reasonably object to such appointment. Unless the Parties agree otherwise, each DARB member shall have significant and relevant design or construction experience of large capital improvement projects using relevant project delivery methodologies. The members of the DARB shall be selected no later than 90 Calendar Days after Design-Build Contractor NTP, whichever is later.
- 3. The DARB will formulate its own rules of operation, which will be kept flexible to adapt to changing situations. The EPM, Director, and Design-Build Contractor will keep the DARB informed of construction activity and progress by submitting to the DARB the monthly progress reports and other relevant data, as appropriate.
- 4. The DARB may meet as often as circumstances warrant. The DARB initially shall meet monthly, until the members become familiar with the Project. If conditions warrant, the DARB may increase or decrease the frequency of the meetings to better serve the Parties and as mutually agreed among the Director, Design-Build Contractor and EPM.
- 5. Each meeting will consist of an informal round table discussion and, if possible, a Project site walk. The round table discussion will be attended by representatives from the City, EPM, and the Design-Build Contractor, plus appropriate representatives of their respective Project Teams. The round table discussions shall include presentations from the Director, the EPM, and Design-Build Contractor to the DARB that may address the following items:
  - a. Design and/or construction work accomplished since the last meeting,
  - b. Current status of the work the current and future schedule,
  - c. Payment status.
  - d. Eligible Disputes referred to the DARB,
  - e. Potential future issues that may come before the DARB and their proposed solutions,
  - f. Any Eligible Disputes not previously referred to the DARB, or otherwise addressed by the DARB, and
  - g. An update regarding previously handled or ongoing issues.
- 6. Unless otherwise agreed by all Parties involved in the dispute, the DARB's recommendation shall be in writing and mailed or otherwise furnished to the Director, EPM, and Design-Build Contractor, as applicable, within ten (10) business days of submission of the dispute.
- 7. Within seven (7) Days following receipt of the DARB's recommendation, each Party shall notify the other Party in writing if they are willing to accept the DARB's recommendation. If a Party fails to provide such written notice, it shall be deemed to have rejected the recommendation. If both Parties accept the recommendation, the DARB's decision is final

and the Parties shall comply with it and enter into an appropriate Change Order, if applicable.

## C. NON-BINDING MEDIATION

- For any Eligible Dispute that the DARB is unable to resolve or any disputed decision of the Director under Section 4.4.4 of the General Conditions, before initiating any litigation or seeking any remedies available at law or in equity, except in an emergency or as necessary for a Party preserve its rights and remedies, the Parties shall mediate, in good faith, as described below.
- 2. The Parties shall initiate the mediation procedure for Eligible Disputes by providing written notice to the Director, City Attorney, Design-Build Contractor, and any other party to the Eligible Dispute as described below ("Mediation Request").
- 3. The Parties shall submit an Eligible Dispute to a neutral, third party mediator chosen by mutual consent of the Parties. If, within fourteen (14) Days of receipt of a Mediation Request, the Parties cannot agree on a mediator, the City shall choose an experienced, neutral, third party mediator, who shall be knowledgeable about design and construction of large capital improvement projects using relevant project delivery methodologies. Mediation shall occur within thirty (30) Days of choosing a mediator, unless the Parties otherwise agree to a later date. Mediation shall occur in Houston, Texas, and each Party shall bear its own costs incurred in connection with the mediation. The Parties shall equally share the costs of the mediator's fees; provided, however, that the Director shall be responsible for issuing to the mediator the full payment of the mediator's fee. subject to appropriation therefor by the City's governing body. Design-Build Contractor's pro-rated share of the mediator's fee shall be deducted from Design-Build Contractor's payment for performed Work. Design-Build Contractor's pro-rated share of the mediator's fee shall be recovered as an offset to the Design Consultant's compensation. The resolution of any dispute disposed of by agreement between the Parties during mediation will be reduced to writing within ten (10) Days of resolution ("Mediated Resolution") by the mediator. Compliance with the Mediated Resolution will be a material duty under this Agreement, to the extent allowed by law.
- 4. Any Party may request Non-Binding Mediation of any Eligible Dispute, whether technical or otherwise. Non-Binding Mediation is voluntary and will not be a condition precedent to submitting a dispute to the Director. The non-requesting Party may decline the request in its sole discretion. If there is concurrence that any particular matter shall be mediated, the provisions of this Section shall apply.
- 5. The mediator shall be a professional mutually acceptable to the Parties who has no current or on-going relationship to any Party in the mediation. The mediator shall have full discretion as to the conduct of the mediation. Each Party shall participate in the mediator's program to resolve the dispute until and unless the Parties reach agreement with respect to the disputed matter or one Party determines in its sole discretion that its interests are not being served by the mediation.
- 6. Non-Binding Mediation is intended to assist the Parties in resolving disputes concerning this Agreement. No mediator shall be empowered to render a binding decision.

- 7. IF A MEDIATION PARTY RECEIVING A MEDIATION REQUEST REFUSES TO MEDIATE, PARTICIPATE IN SELECTING A MEDIATOR, TO ATTEND MEDIATION, OR FAILS TO ATTEND THE MEDIATION, THIS ALTERNATIVE DISPUTE PROVISION WILL BE DEEMED TO HAVE BEEN FULFILLED BY THE AGGRIEVED PARTY AND THE AGGRIEVED PARTY IS PERMITTED TO PURSUE ANY OTHER REMEDIES IT MAY HAVE.
- 8. If the Non-Binding Mediation does not result in settlement, any Party may file suit in a court of law to be conducted in Harris County, Texas. Exhaustion of all the processes above is a prerequisite to each Party before filing a lawsuit, unless waived by the Parties; provided, however, that nothing herein shall preclude a Party from commencing a lawsuit or other legal proceeding if necessary to preserve its rights, satisfy the applicable statute of limitations or repose, or secure emergency equitable relief.
- 9. The Parties shall continue to comply with, perform, and observe all their obligations under their respective Agreements notwithstanding the pendency of a dispute.